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IN THE

Supreme Court of the United States

October Term, 1992

JOSEPH BRESS, as Executive Director of the Governor's Office of Employee Relations; N.Y.S. DEPARTMENT OF AUDIT & CONTROL; STATE OF NEW YORK; MARIO CUOMO, as Governor of the State of New York; EDWARD V. REGAN, as Comptroller of the State of New York,

Petitioners,

against

RAND CONDELL, as President of Public Employee's Federation, AFL-CIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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(2830—LC9-165—1993)

Questions Presented

1. Whether a State, facing the worst fiscal crisis since the Great Depression, may modify by legislation a State employees' collective bargaining agreement without violating the Contract Clause.

2. Whether, given the other alternatives of drastic cuts in public services or massive layoffs, a State may adopt a mandatory "salary deferral" program under which wages withheld would be repaid upon termination of State service at the higher of the salary in effect when withheld or upon termination.

3. Whether a court order directing the refund of salary withholdings is barred by the Eleventh Amendment when the withholding occurred in the past and the court order, though styled as injunctive relief, consisted of a purely retrospective award of money from the State treasury.

Parties.

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

1. Joseph Bress, as Executive Director of the Governor's Office of Employee Relations;

2. New York State Department of Audit & Control;

3. State of New York;

4. Mario Cuomo, as Governor of the State of New York;

5. Edward V. Regan, as Comptroller of the State of New York; and

6. Rand Condell, as President of Public Employee's Federation, AFL-CIO.

Parties numbered 1 through 5 inclusive are petitioners. Party numbered 6 is respondent.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992.

JOSEPH BRESS, as Executive Director of the Governor's Office of Employee Relations; N.Y.S. DEPARTMENT OF AUDIT & CONTROL; STATE OF NEW YORK; MARIO CUOMO, as Governor of the State of New York; Edward V. Regan, as Comptroller of the State of New York,

Petitioners,

against

RAND CONDELL, as President of Public Employee's Federation, AFL-CIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Opinions Below.

The opinion of the Court of Appeals for the Second Circuit, printed in petitioners' appendix at pages A3-A13, is

reported at ____ F2d ____ (2d Cir 1993). It is available on WESTLAW at 1993 WL 2909.

The opinion of the District Court, printed in petitioners' appendix at pages A19-A30, is not officially reported. It is available on WESTLAW at 1992 WL 133900.

Jurisdiction.

The judgment of the Court of Appeals was entered on January 8, 1993. This petition was docketed on February 25, 1993. Jurisdiction is invoked under 28 USC § 1254(1).

Statute Involved.

New York State Finance Law, § 200 (2-a [a]), as enacted by L. 1990, ch. 947, § 12.

§ 200. Payment of salaries

2-a. (a) Notwithstanding the provisions of any other law:

(1). For the payrolls covering officers and employees of the state, except as provided in subparagraph (2) of this pargagraph:[1] commencing with the institutional payroll period commencing December 27, 1990, and the administrative payroll period commencing on January 3, 1991, payment on the payment date of the five payroll periods commencing with such dates shall be for nine-tenths of that amount paid each payroll period until a total of five-

[1]So in original. Probably should read "paragraph".

tenths of salary for one payroll period that would be paid but for this subdivision has been withheld. Thereafter, starting with the sixth payroll period after December 27, 1990, or January 3, 1991, as appropriate, payment shall be in the same manner as in effect prior to December 27, 1990, or January 3, 1991.

(2) The provisions of subparagraph (1) of this paragraph shall apply to officers and employees of the state subject to paragraph (1) of subdivision b of section five of chapter 353 of the laws of 1982 commencing with the payroll period (and corresponding payroll date) immediately following the completion of the procedure for the payment of salaries and wages established by the comptroller pursuant to such paragraph of chapter 353 of the laws of 1982.

(3) where salary has been withheld pursuant to this subdivision, in lieu of such salary, an officer or employee who retires or otherwise separates from service, or the beneficiary of an employee who dies, shall be entitled to a lump sum payment equal to the salary so withheld at the rate of basic annual salary in effect at the time of death, retirement, or other separation from service for each day or part thereof for which salary was withheld pursuant to this section, but in no case shall such lump sum payment be less than the amount of salary originally withheld.

Statement of the Case.[1]

1. The magnitude of the budgetary crisis

In the spring of 1990, the State adopted a budget which it reasonably believed was balanced (J.App., 110-111, ¶¶ 10-11). By State Constitutional mandate (N.Y. Const., Art. VII, § 2), New York is required to adopt a balanced budget prior to the start of each fiscal year beginning April 1. Unforeseen events in 1990 occurred which dramatically changed the economy and the budget, leading to a major deficit crisis in the fall of 1990 (J.App., 108, ¶ 2). The Legislature, the Governor and the New York State Division of the Budget ("DOB"), when they made predictions for fiscal year ("FY") 90-91 in the spring of 1990, could not have known that Iraq would invade Kuwait (J.App., 110, ¶ 8; 232). Using the best available economic information from a variety of sources, the State passed a budget in May 1990 which it reasonably believed would be balanced (J.App., 110, ¶ 10 — 112, ¶ 14; 174, ¶¶ 17-19; 203, ¶ 4; 214).

By October 30, 1990, when DOB issued its "Mid-Year Financial Update", there were drastically lower estimates of tax revenues for the remainder of the fiscal year ending March 31, 1991 (J.App., 115, ¶ 22 — 116, ¶ 23; 160-161; 228). Outside economic reporting services described the economy at that time as a national recession (J.App., 214; 99; 110, ¶ 8; 185-186, ¶ 20; 229-248, esp. 231).

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[1]References to "App, A _____ " refer to pages of the Appendix to this Petition. References to "J.App., _____ " refer to pages of the Joint Appendix in the Court of Appeals.

Within the next few weeks, the Governor and DOB took drastic action to reduce what was then predicted to be a deficit of more than a *billion* dollars for the remainder of FY 90-91 (J.App., 141-142; 160-161; 93, ¶ 20; 116, ¶ 24). The unfortunate timing of such a large deficit so late in the fiscal year was very significant (J.App., 116, ¶ 24). New revenues, such as from new taxes, are particularly difficult to implement, since those revenue-raising devices have enormous "lead time" to promulgate implementing rules and interpretive regulations (J.App., 117-118, ¶ 27).

Additionally, the Legislature and the Governor did not want to increase so-called broad-based—income, sales and general business—taxes (J.App., 117-118, ¶ 27). New York was already one of the highest tax States in the nation and in the region (J.App., 118, ¶ 27; 258). State policy-makers believed that an increase in broad-based taxes would further an exodus of business and jobs from the State (J.App., 117-118, ¶ 27; 125, ¶ 39).

Although it was possible to issue so-called "deficit notes" (short term borrowings) (*see* N.Y. Const., Art. VII, § 12), that was inadvisable because it would only aggravate the deficit in the next fiscal year beginning April 1, 1991 (J.App., 118, ¶ 28; 168, ¶ 4; 175-176, ¶ 23). The projected deficit for FY 91-92 was $6 billion, a problem that would itself need a combination of new revenues and spending reductions in spring of 1991 to attain a balanced budget for FY 91-92 (J.App., 123, ¶ 38). In the past, the use of deficit notes had worsened the State's credit rating (117, ¶ 26; 168, ¶ 4; 175-176, ¶ 23). In any event, deficit notes would have had to have been repaid out of the FY 91-92 budget, since the State is required to submit a balanced budget (which includes repayment of prior deficit notes) at the start of the

fiscal year (J.App., 131, ¶ 4; 133, ¶ 7[a]; 169-177, ¶¶ 6-12; 224; 281).

To close the billion dollar deficit for the remainder of FY 90-91, the State implemented a deficit reduction plan which included, among other measures, a complete hiring freeze throughout the Executive Branch (J.App., 115, ¶ 22; 160-161; 244, 249-257). Additionally, the State effected an unprecedented number of reductions in State services, consolidation or elimination of agencies or offices, and numerous other austerity measures (J.App., 166, ¶ 8; 171, ¶ 10; 174-175, ¶ 21; 244; 249-257).

Since a very large percentage of the budget is earmarked for welfare and social services benefits, which are very difficult to trim (J.App., 106; 207, ¶ 3; 240; 277), the bulk of the deficit had to be addressed by reducing labor costs—either through layoffs, furloughs or other measures (J.App., 118-119, ¶ 29; 208). As Budget Director Bulgaro explained (J.App., 121, ¶ 33):

> Since direct personnel costs (i.e. salaries) account for 70% of state agency operations, the achievement of $1 billion in total DRP [deficit reduction plan] savings required a reliance on actions to reduce those personnel costs. Although the DRP included attrition (keeping vacant positions open without refilling them) [,] a formal hiring freeze, and layoffs (mandated separation from State service), these options could not generate the necessary level of savings. Approximately $45 million was anticipated through attrition and a hiring freeze, and about $12.5 million through layoffs. Additional savings from attrition and hiring freezes were not possible since only a few

> months remained in the fiscal year. And, although additional layoffs could have been used to generate a portion of the remaining $128 million in required savings, the adverse impacts on State programs and employees would have been unacceptable.

The Governor proposed a mandatory furlough of Executive Branch employees for 5 days without pay (J.App., 119, ¶ 30; 164, ¶ 1; 294, ¶ 1). The unions opposed any furloughs and the Legislature rejected the Governor's proposal for employee furloughs (J.App., 70; 119-120, ¶ 31; 164, ¶ 1; 190-191, ¶ 31). The Legislature then enacted the salary deferral program for the Executive Branch of the state (J.App., 36, ¶ 13; 38, ¶ 20; 71).

The salary deferral program had about the same financial savings as a furlough plan (J.App., 119-120, ¶ 31). Both had the distinct advantages of avoiding layoffs (J.App., 119, ¶ 30). Layoffs were considered as an option to save $128 million in fiscal 90-91 (J.App., 121, ¶ 34; 176, ¶ 25). However, 30,000 state workers would have been laid off (J.App., 121, ¶ 34).

> This approach would have brought many smaller agencies to a virtual standstill and would have severely curtailed and delayed the delivery of essential public services by agencies such as the Departments of Health, Motor Vehicles, Transportation and Environmental Conservation. (J.App., 121-122, ¶ 34).

Even then, the savings from layoffs would have been nullified in certain areas, such as in the Offices of Mental Health and Mental Retardation and the Department of Corrections,

where facilities must operate 24 hours a day and where overtime payments to remaining employees would have resulted (J.App., 122, ¶ 35; 176-177, ¶ 25). Only the salary deferral plan, however, kept employees working to avoid disruptions to necessary services (J.App., 119, ¶ 30).

In agreeing with the Legislature that State employees throughout the Executive Branch should shoulder their fair share of the budgetary crisis, the Governor undoubtedly saw it as the lesser of two evils, since the only plausible alternative was massive layoffs throughout the Executive Branch (J.App., 119-120, ¶ 31; 271-272).

Those are the stark facts of the budget crisis which faced New York officials in December of 1990. Simply stated, the State of New York was facing its most severe economic disaster since the Depression (J.App., 122, ¶ 37; 128, ¶ 47; 165, ¶ 6; 260).

2. **The salary deferral plan in question**

As a partial solution to the budget deficit, the New York State Legislature enacted the "salary deferral" program at issue in this case. *See* L. 1990, ch. 947, § 12 ("Chapter 947"); *codified at* N.Y. State Finance Law, § 200 (2-a [a]). The billion dollar "deficit closing" program included $199 million in new or increased revenues, as well as $802 million in reductions in expenditures (J.App., 120, ¶ 32; 249-257). Fully one-quarter of that reduction in spending ($200 million) was projected from the Chapter 947 salary deferral plan here at issue (J.App., 120, ¶ 32). Chapter 947 implemented a "lump sum separation payment" program in which the equivalent of five days' pay was withheld from Executive Branch employees during the last quarter of FY

90-91, *i.e.*, between January 1, 1991 and April 1, 1991 (J.App., 120, ¶ 32).

This statute had the effect of a reduction in salary of one week's pay for every employee of the Executive Branch of New York State government. It was implemented by a reduction of salary for five payroll periods (ten calendar weeks) of gross salary by ten percent. The mechanics and details of the salary deferral program are spelled out in the Office of State Comptroller's *Payroll Bulletin No. P-679*, reprinted in the Appendix at A33-A42.

3. Decisions in the courts below

In a memorandum-decision and order (App, A19-A30; J.App., 305-316; not reported in F.Supp.; available on WESTLAW at 1992 WL 133900), the district court declared Chapter 947 unconstitutional as violative of the Contract Clause (App, A19-A30; J.App., 308, 315-316). The district court based its ruling on prior cases which had found similar "lag payroll" statutes unconstitutional (App, A22-A28; J.App., 308, 315-316).

The Court of Appeals affirmed in an opinion which relied heavily on prior "lag payroll" decisions (App, A7-A12). *See Association of Surrogates v State of New York*, 940 F2d 766 [2d Cir 1991], *cert. denied*, ____ US ____, 112 S Ct 936, 117 L Ed 2d 107 [1992])[2] ("*Surrogates I*"); *Association of Surrogates v State of New York*, 79 NY2d 39, 580 NYS2d 153 (1992) ("*Surrogates II*").

[2]The petition for a writ of certiorari in *Surrogates I* raised only the question of the Eleventh Amendment.

Reasons for Granting the Writ.

This case raises two important issues, each of which independently warrants the grant of a writ of certiorari. *First*, the case involves important questions of the power of States, consistent with the Contract Clause, to modify labor contracts with public employees as an alternative to massive layoffs or drastic reductions in public services. The court below construed this reserved "police power" of the States so narrowly (or, correlatively, the scope of the Contract Clause so broadly) that even a fiscal crisis of historic proportions would not qualify as a valid ground to modify public employees' contracts. *Second*, the court below erred in not giving effect to the protection afforded States against monetary judgments under the Eleventh Amendment. The Second Circuit's reliance on its own prior precedents was unjustified and contrary to decisions of this Court.

In the pages which follow, we briefly explain the merits of both of these issues.

I.

The Second Circuit misconstrued the scope of the Contract Clause.

Contrary to the belief of the Second Circuit, the severity of the State's fiscal crisis in 1990 places this case squarely within the range of permissible modification of governmental labor contracts. This is apparent from examination of the Contract Clause cases which analyze the issues of the "reasonableness" of, and "necessity" for, substantial impairments of contract rights.

A finding of impairment of contract rights is but a preliminary step, since it must be counterbalanced against the "essential attributes of sovereign power" necessarily reserved by the States to safeguard the welfare of its citizens. *Home Bldg. & Loan Assn. v Blaisdell*, 290 US 398, 435 (1934); *United States Trust Co. of New York v New Jersey*, 431 US 1, 21-23 (1977). Although, to be sure, contracts to which the State is itself a party are subject to close scrutiny (*United States Trust Co.*, 431 US at 25-26), that does not mean that little or no deference is to be paid to legislative findings.

Admittedly, *United States Trust Co.* stated that "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake". 431 US at 26. However, *United States Trust Co.* did not hold that little or no deference was to be accorded legislative judgments as to reasonableness and necessity. As the New York Court of Appeals explained in a case involving New York City's financial crisis of the mid-1970s, the mere statement of the principle in *United States Trust Co.* that *complete* deference to legislative assessment of reasonableness is not appropriate "itself implies that *some* deference at least is appropriate". *Subway-Surface Supervisor's Assn. v New York City Tr. Auth.*, 44 NY2d 101, 112, 404 NYS2d 323, 329 (1978) (emphasis added).

United States Trust Co., which did not deal with a fiscal emergency, simply did not decide what the limits of a State's powers were in a fiscal emergency. The contract breached in *United States Trust Co.* was a covenant with bond-holders of the Port Authority of New York and New Jersey. Under the terms of that covenant, the Authority

pledged that it would not use any funds pledged as security for those bonds for any other purpose. Twelve years after signing those covenants, the Port Authority repealed that covenant outright. The Authority repudiated the bond covenant not because of a fiscal crisis, but instead out of a desire to implement a bi-state plan to encourage the use of public transportation. 431 US at 32.

This Court in *United States Trust Co.* cited approvingly a number of Depression-era and New Deal cases which upheld mortgage moratoria and other measures designed to protect the general public from the ravages of the Depression. *See, e.g., Home Bldg. & Loan Assn. v Blaisdell*, 290 US 398, 438-439 (1934) (upholding, against a Contract Clause challenge, a law authorizing state courts, for the duration of the economic emergency declared to exist by the legislature, to extend the period of redemptions from foreclosure sales); *Faitoute Iron & Steel Co. v City of Asbury, N.J.*, 316 US 502, 515-516 (1942) (upholding a receivership plan by which the creditors of a bankrupt municipality received substitute securities with lower interest rates and later maturity dates); *see also, Viex v Sixth Ward Bldg. & Loan Assn. of Newark*, 310 US 32, 40-41 (1940); *East N.Y. Sav. Bank v Hahn*, 326 US 230, 232, 234-235 (1945).

Determination of whether an impairment is "necessary" requires consideration of the magnitude of the public purpose in question. Obviously, a fiscal crisis so severe that it threatens to put people out of their homes and onto the streets would qualify. *Home Bldg. & Loan Assn. v Blaisdell*, 290 US at 434. Likewise, a stop-gap measure to stave off municipal bankruptcy would qualify. *Faitoute Iron & Steel Co.*, 316 US at 515. Similarly, a drastic municipal budget crisis would qualify. *Subway-Surface Supervisors Assn.*, 44

NY2d at 112-113, 404 NYS2d at 329-330. On the other hand, a merely desirable—as distinct from necessary—public policy of substituting public transit for automobiles for commutation purposes did not qualify. *United States Trust Co.*, 431 US at 32.

In the case at bar, the Court of Appeals gave mere lip service to the doctrine that a severe fiscal crisis may give the States more leeway to modify a pre-existing public employee contract (App, A11-A12). In actuality, the Second Circuit rendered the State's contract modification power a nullity. If the worst fiscal crisis since the Great Depression[3] does not qualify, it is hard to see what level of disaster short of imminent bankruptcy would qualify under the Second Circuit's analysis.

It bears emphasis that the salary reduction here was not a total confiscation; rather, it was a salary deferral (N.Y. State Finance Law, § 200 [2-a (a) (3)] [reprinted in Petition at 3]). The statute in question provided for the refund of the money withheld upon retirement or termination from State employment (App, A39). Moreover, the refund would be at the higher of the salary in effect at the time of the withholding or at the time of termination of employment (App, A39). Thus, any employees who received a pay raise, promotion or other salary increase would automatically (upon termination) be entitled to a refund of the withholdings at a higher rate of pay (App, A39).

The public interest in continuing vital governmental services (*see* J.App., 121-122, ¶¶ 34-36; 127-128,

[3]It is factually undisputed in the Record that the fiscal crisis facing the State in December 1990—when Chapter 947 was enacted—was the worst facing the State since the Depression (J.App., 122, ¶ 37; 128, ¶ 47; 165, ¶ 6; 260).

¶¶ 45-46; 176, ¶ 24), as well as the severity of this budget crisis (J.App., 116-118, ¶¶ 24-27), demonstrates a sufficient public purpose, in the context of a 1.92% wage deferral, to satisfy the test of the Contract Clause that the means chosen are reasonable and necessary in light of the magnitude of the public need. In similar circumstances involving New York City's fiscal crisis of the mid-1970s, the New York Court of Appeals upheld a 5% wage-deferral statute against a Contract Clause challenge by municipal workers who had a contractual right to those wages under a collective bargaining agreement. *Subway-Surface Supervisor's Assn.*, 44 NY2d at 106-107, 404 NYS2d at 326. In rejecting plaintiffs' constitutional argument in that case, the New York Court of Appeals explained (44 NY2d at 111-112, 404 NYS2d at 329):

> Faced with the financial distress under which the city was laboring and which threatened to overwhelm it, * * * the New York State Legislature determined that the imposition of the terms of the wage-freeze legislation on the employees of the authority, as well as on those employed by the city itself and by other related organizations, was a necessary and appropriate step toward relieving the financial crisis and thereby continuing the performance of governmental services. * * * [T]he circumstances themselves so clearly demonstrate that the Legislature's conclusion was a valid one. (Footnote omitted.)

The court below simply jumped on the bandwagon of striking down lag payrolls because the other, somewhat similar, legislative measures had been struck down in *Surrogates I*, 940 F2d 766, and *Surrogates II*, 79 NY2d 39, 580 NYS2d 153. *Surrogates I* and *Surrogates II* are distinguish-

able in material respects from the case at bar. Those cases involved comparatively minor amounts of money and did not entail the threatened cutback of basic governmental services or the specter of massive layoffs. *Surrogates I* involved only $7 million dollars in a judiciary budget of almost $1 billion. *Surrogates I*, 940 F2d at 769, 773. Moreover, the money in question there was earmarked for expansion of the court system. 940 F2d at 768, 773. Similarly, *Surrogates II* involved only $10.7 million, earmarked at restoring to the judiciary budget the lag payroll funds ordered to be repaid to court employees in *Surrogates I*. *See*, *Surrogates II*, 79 NY2d at 43-44, 580 NYS2d at 154-155. Moreover, the lag payroll at issue in *Surrogates I* was enacted near the beginning of FY 90-91, well before the fiscal crisis materialized. *See*, L. 1990, ch. 190, § 375 (enacted May 25, 1990). The lag payroll in *Surrogates II* was enacted in 1991 in an attempt to replace the money ordered refunded in *Surrogates I*. *See*, L.1991, ch. 166, § 382 (enacted June 15, 1991).

Thus, it is readily apparent that neither *Surrogates I* nor *Surrogates II* involved a genuine fiscal crisis for purposes of the "reasonable and necessary" inquiry under the Contract Clause cases.

By contrast, the "salary deferral" program enacted in December of 1990 involved $128 million in direct reductions in expenditures for FY 90-91 (J.App., 120, ¶ 32).[4] The salary deferral and related reductions in labor costs in con-

[4]In the case at bar, involving one of several public employee unions, $50,000,000 is in controversy. Other public employee unions, whose members collectively experienced salary deferrals of $78,000,000, have settled their lawsuits with the State as part of successor collective bargaining agreements.

nection with Chapter 947 were projected to reduce spending by $200 million (J.App., 120, ¶ 32). In other words, the savings in FY 90-91 from Chapter 947 accounted for fully one-fourth of the $800 million in reductions in expenditures (J.App., 130, ¶ 32). The remaining $200 million of the billion dollar deficit was closed by new or increased revenues from taxes (J.App., 249-257). Thus, the salary deferral program in question is distinguishable, in amount, in importance, and in substance from the lag payroll programs nullified in *Surrogates I* and *Surrogates II*.

In the current economic and fiscal climate[5], the proper interpretation of the Contract Clause in the context of governmental labor contracts is an issue worthy of plenary review. States need to know with some measure of certainty what management tools may legitimately be used to solve budget crises. That the Contract Clause limits governmental power to abrogate public employment contracts is readily conceded; the problem here is that the Second Circuit's analysis went much too far in limiting the State's right to modify public employee contracts where the only other reasonable alternatives were drastic layoffs of public employees and the concomitant disruptions of public health, safety and welfare services.

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[5]See *State of the Union Address* (President Clinton), February 17, 1993.

II.

The Second Circuit's order of purely monetary relief contravenes the Eleventh Amendment.

The decision below, in ordering the State to refund about $50 million, is plainly in violation of the constraints imposed by the Eleventh Amendment and in conflict with this Court's consistent decisions. Review by this Court is warranted to correct this patent error.

By the time the district court entered its judgment on June 18, 1992 (*see* App, A18; J.App., 317), the Chapter 947 salary deferral program had been fully implemented, and the money saved had been spent in FY 90-91. Thus, the substance of the case at bar, though couched in terms of injunctive and declaratory relief, was purely and simply to obtain a refund from the State Treasury of respondent's $50,000,000 share of the salary deferral plan.[6]

Chapter 947 reduced the annual salary by five days' pay. This occurred over a ten-week, or five-payday, period, during which the gross salary of each Executive Branch employee's paycheck was reduced by 10%.

As of April 1, 1991 (the start of FY 91-92), the consequences of the salary deferral program had been fully accomplished, except as to persons hired thereafter. As to the previously deferred salary, the only way to restore the Chapter 947 funds to the Executive Branch employees is to write a check for the amounts withheld. That is purely and

[6]A relatively minor aspect of the judgment, (App, A18, A37; J.App., 317) operates to enjoin the implementation of the salary deferral program for any newly-hired employees. Defendants acknowledge that the Eleventh Amendment provides no defense to such purely prospective relief.

substantively a retroactive payment from the Treasury for past violations of the Constitution (assuming, *arguendo*, that Chapter 947 was not justified as reasonable and necessary; *see* Point I, *supra*).

Such a retroactive award of money damages is plainly barred by the Eleventh Amendment. Where the action is in essence one for the recovery of money from the State, the State is the real, substantial party in interest and the Eleventh Amendment stands as a bar to a federal court's exercise of jurisdiction. *Ford Motor Co. v Department of Treasury of State of Indiana*, 323 US 459, 464 (1945) (even though plaintiff prevailed in a suit against Indiana officials on the basis that its tax department wrongfully assessed income taxes on sales claimed to have occurred in Indiana, the Eleventh Amendment barred the claim for a tax refund).

The decisive distinction is between *prospective* relief and *retrospective* relief. Purely prospective relief, such as an injunction directed to *future* conduct—as, for example, a directive to conform conduct to federal law—is not barred by the Eleventh Amendment, whereas a refund of moneys wrongfully withheld in the past *is* barred by the Eleventh Amendment. *Compare*, *Quern v Jordan*, 440 US 332, 346-349 (1979) (an injunction in a welfare class action suit directing the defendants to furnish a simple explanatory notice to class members [advising them of their state administrative procedure rights] was not barred by the Eleventh Amendment), *with*, *Edelman v Jordan*, 415 US 651, 663 (1974) ("a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment").

In *Edelman*, the State of Illinois wrongfully withheld welfare funds from eligible recipients. 415 US at 653-656.

The district court, after finding that the State violated federal regulations with respect to such benefits, ordered Illinois to cease violating the regulations *and to refund benefits wrongfully withheld*. *See* 415 US at 656. Although the Court of Appeals affirmed, the Supreme Court reversed that portion of the Seventh Circuit's decision which upheld the order directing retroactive benefits. 415 US at 658-659.

Quern was a later case arising out of the same facts as *Edelman*. Although *Quern* allowed prospective relief, the Court drew a clear line between violations of federal law which occurred prior to the entry of the court's order determining the wrongfulness of the defendant's conduct (as to those, the Eleventh Amendment was a total and complete bar) and certain steps directed towards preventing future violations of federal law after the date of adjudication (as to those, the Eleventh Amendment was not a bar). *Quern*, 440 US at 333, 337; *see also*, *Granados v Reivitz*, 776 F2d 180, 183 (7th Cir 1985) ("This action, although couched in declaratory and injunctive relief terms, seeks purely retrospective damages from a state. As such, it is prohibited by the eleventh amendment.").

Those authorities are dispositive here. The substance of respondent's claim was a refund of money, pure and simple. That relief is barred by the Eleventh Amendment as a retroactive award of damages. A refund of salary previously withheld pursuant to Chapter 947 is plainly such an impermissible retroactive award of money damages.

The Second Circuit brushed off the State's Eleventh Amendment argument in reliance on prior Second Circuit caselaw, principally the "lag payroll" case of *Surrogates I*, 940 F2d 766, *cert. denied*, ____ US ____, 112 S Ct 936, 117 L Ed 2d 107 (1992) (*see* App, A9, A12-A13). To the extent

that the court below labelled the instant case as a "lag payroll" case, that is a misnomer and highly significant in the Eleventh Amendment context.

In *Surrogates I*, which was properly characterized as a "lag payroll" case, the mechanism used was in one significant way very different from the present salary deferral mechanism. In *Surrogates I*, prior to institution of the lag, employees were paid immediately after the pay period to which the paycheck related. Once the lag was fully implemented, paychecks related to the pay period which had ended two weeks earlier. In that situation, the Second Circuit was able to undo the error it found by ordering future paychecks to be paid on a non-lagged basis in conformity with the contract as the court read it. While that cost the State money, the relief mechanism was an order requiring the State's paymasters to comply with the law prospectively.

By contrast, in the present case, prior to the deferral, there was a two-week lag that had originated in 1982 under a collective bargaining agreement. That two-week lag remained at the end of the salary deferral implemented by Chapter 947 of the Laws of 1990. Here, instead of simply delaying receipt of pay by two weeks on a continuing basis, as a result of the deferral, one week's pay will not be received until termination of the employment relationship. Mechanically, the deferral can only be undone by a refund check, not by elimination of a new lag period since none had

been created (App, A33). Reliance below on *Surrogates I* was in disregard of this Court's teachings under the Eleventh Amendment. Certiorari should be granted.

CONCLUSION

This court should grant a Writ of Certiorari.

Dated: Albany, New York
February 24, 1993

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the State of
New York
Attorney for Petitioners

JERRY BOONE
Solicitor General
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

MICHAEL S. BUSKUS
Assistant Attorney General
of Counsel

Judgment of the Second Circuit (1/8/93)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 8th day of January, one thousand nine hundred and ninety-three.

Present:

Hon. Wilfred Feinberg, Hon. J. Daniel Mahoney, Circuit Judges.

Hon. Robert F. Peckham, District Judge*.

RAND CONDELL, as President of the Public Employees Federation, AFL-CIO,

Plaintiffs-Appellee,

against

JOSEPH BRESS, as Executive Director of the Governor's Office of Employee Relations; N.Y.S. DEPARTMENT OF AUDIT & CONTROL; STATE OF NEW YORK; MARIO CUOMO, as Governor of the State of New York; EDWARD V. REGAN, as Comptroller of the State of New York,

Defendants-Appellants.

92-7772

Appeal from the United States District Court for the Northern District of New York.

The Honorable Robert F. Peckham, Senior United States District Judge for the Northern District of California, sitting by designation.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED and DECREED that the judgment of said District Court be and it hereby is affirmed in accordance with the opinon of this court with costs to be taxed against the appellant.

ELAINE B. GOLDSMITH, Clerk
By:
EDWARD J. GUARDARO
Staff Attorney

UNITED STATES COURT OF APPEALS
FILED
JAN 8 1993
ELAINE GOLDSMITH, CLERK
SECOND CIRCUIT

Opinion of the Second Circuit (1/8/93)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 523—August Term 1992

Argued: November 20, 1992 Decided: January 8, 1993

Docket No. 92-7772

RAND CONDELL, as President of the Public Employees Federation, AFL-CIO,

Plaintiffs-Appellee,

—against—

JOSEPH BRESS, as Executive Director of the Governor's Office of Employee Relations; N.Y.S. DEPARTMENT OF AUDIT & CONTROL; STATE OF NEW YORK; MARIO CUOMO, as Governor of the State of New York; EDWARD V. REGAN, as Comptroller of the State of New York,

Defendants-Appellants.

Before:

FEINBERG and MAHONEY, *Circuit Judges,*
and PECKHAM,* *District Judge.*

* Honorable Robert F. Peckham, Senior United States District Judge for the Northern District of California, sitting by designation.

Appeal from judgment of United States District Court for the Northern District of New York, Frederick J. Scullin, Jr., J., holding that statute providing for salary deferral, commonly referred to as "lag payroll" statute, was unconstitutional impairment of contract.

Affirmed.

MICHAEL S. BUSKUS, Albany, NY, Assistant Attorney General of the State of New York (Robert Abrams, Attorney General of the State of New York, Peter H. Schiff, Deputy Solicitor General, of Counsel), *for Defendants-Appellants.*

NANCY L. BURRITT, Albany, NY, *for Plaintiff-Appellee.*

FEINBERG, *Circuit Judge*:

This is an action by a public sector labor union for a judgment declaring unconstitutional a salary deferral program, commonly referred to as a "lag payroll," implemented pursuant to a New York statute. Defendants State of New York and various state officials appeal from a judgment of the United States District Court for the Northern District of New York, Frederick J. Scullin, Jr., J., holding that the statute was an impairment of contract prohibited by the United States Constitution. For the reasons set forth below, we affirm the judgment of the district court.

I. Background

Plaintiff Public Employees Federation, AFL-CIO (the Union) represents some 50,000 employees of the executive branch of the State of New York who furnish professional, scientific and technical services. The Union and the State of New York entered into a collective bargaining agreement for the period of April 1, 1988 through March 31, 1991. The agreement provided that salary payments be computed on the basis of 10 working days. In addition, the agreement set forth designated annual salary levels and continued a two-week lag payroll that had been negotiated in 1982.

In December 1990, the state legislature enacted Chapter 947, § 12, *reprinted in* N.Y. State Fin. Law, § 200 (2-a[a]) (McKinney Supp. 1992), which imposed a five-day lag payroll on executive branch employees, including the employees represented by the Union. Pursuant to Chapter 947, the affected employees received only nine-tenths of their salary for each of five bi-weekly periods between December 27, 1990 and March 31, 1991. The withheld compensation would not be released until the employee died, retired or otherwise left state employment. Under the statute, employees who were hired after December 27, 1990 would be subject to this lag during their first 10 weeks of employment.

The state legislature enacted Chapter 947 as a response to a budget deficit estimated by defendants to be $1.005 billion in November 1990. At that time, the Governor of the State of New York made known his intention to eliminate the budget deficit without issuing Tax and Revenue Anticipation Notes, levying new taxes, raising rates on existing taxes or laying off additional executive branch employees. These options, singly or in combination, were rejected as "unwise fiscal policy." It was thought they would cause "further damage to the state's competitive position vis-a-vis other states" or have

"unacceptable" adverse impacts on state programs and employees. In other words, the state had alternatives, but not "acceptable" ones. Instead of pursuing those alternatives, the state chose to withhold lagged wages from executive branch employees to raise $128 million of the more than $1 billion estimated as necessary to balance the state budget. Despite the Governor's deficit reduction plan, the enactment of Chapter 947 and the subsequent withholding of lagged wages, the state ended up issuing Tax and Revenue Anticipation Notes to close what had become an actual budget gap of $1.081 billion at the end of the 1990-91 fiscal year.

II. Proceedings Below

Plaintiff Union brought this action for declaratory and injunctive relief in January 1991. In its amended complaint, the Union sought, among other things, a declaration that Chapter 947 violated Article I, § 10 of the United States Constitution (the Contract Clause) and denied substantive due process under the Fourteenth Amendment. The amended complaint also sought permanent injunctive relief against the operation of Chapter 947 and the release to employees in the bargaining unit represented by the Union the salary withheld pursuant to Chapter 947.

The Union moved for summary judgment on the Contract Clause and Fourteenth Amendment claims. Defendants cross-moved for summary judgment on the grounds that Chapter 947 was not an unconstitutional impairment of contract; that Chapter 947 was not arbitrary government action violative of substantive due process; and that the district court lacked subject matter jurisdiction under the Eleventh Amendment.

In a memorandum opinion and order, dated June 9, 1992, the district court held that Chapter 947 violated the Contract

Clause. The judge enjoined defendants from "continuing the effects and application" of Chapter 947 and directed the state to "return the withheld monies, plus interest." This appeal followed.

III. Discussion

The Contract Clause provides in pertinent part: "[N]o state shall . . . pass any . . . law impairing the obligation of contracts . . ." Although this language is absolute, finding an "impairment" is in fact a preliminary step toward "resolving the more difficult question whether that impairment is permitted under the Constitution." Association of Surrogates and Supreme Court Reporters Within the City of New York v. State of New York, 940 F.2d 766, 771 (2d Cir. 1991), cert. denied, 112 S. Ct. 936 (1992) (Surrogates I) (quoting United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 21 (1977)). In cases involving private contracts, courts must first determine whether the legislation causes a "substantial" impairment and then, if it does, whether the legislation is a "reasonable" means to a "legitimate public purpose." Id. Where social or economic measures are involved, courts will defer to legislative judgment in determining whether particular actions are "reasonable and necessary." United States Trust, 431 U.S. at 25. Courts are less deferential to a state's judgment of reasonableness and necessity when a state's legislation is self-serving and impairs the obligations of its *own* contracts. Indeed, "a State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives." Id. at 30-31.

This Court, in *Surrogates I*, and the New York Court of Appeals, in Association of Surrogates and Supreme Court Reporters Within the City of New York v. State of New York, 79 N.Y.2d 39 (1992) (Surrogates II), determined that

legislation similar to that in the present case was unconstitutional. The plaintiffs in both *Surrogates* cases were nonjudicial employees of the state Unified Court System whose collectively bargained-for rights were affected by the state legislative action.

Surrogates I concerned a May 1990 statute set forth in 1990 N.Y. Laws, ch. 190, § 375, which authorized New York State to pay the affected employees nine days' salary rather than 10 in each of 10 successive two-week pay periods. Surrogates I, 940 F.2d at 769. Thus, employees were paid for a total of 50 instead of 52 weeks for the fiscal year ending March 31, 1991. The two weeks' withheld pay was to be repaid to the employees upon the termination of their employment with the state at their then applicable rate of pay. Id. This measure was expected to save the state approximately $7 million. As in the present case, the employees in *Surrogates I* were parties to collective bargaining agreements with the state that included the provision that "bi-weekly salaries will be computed on the basis of 10 working days." Id. at 770.

This Court held that there was a contractual impairment and that it was substantial. Id. at 771-72. We reasoned that withholding an amount equal to 10 percent of an employee's pay over a 10-week period could prevent the employee from meeting short-term financial obligations like mortgages, loans, credit card payments and the like. Id. at 772. We also pointed out that payment to an affected employee of the money withheld could be postponed perhaps as long as 45 years if the employee devoted an entire career to government service. Id. We rejected the defendants' contention that the substantial impairment was reasonable and necessary for the state's goals, since "[t]he state could have shifted the seven million dollars from another governmental program, or it could have raised taxes." Id. at 773. We held that

> [t]he contract clause, if it is to mean anything, must prohibit New York from dishonoring its existing contractual obligations when other policy alternatives are available . . . . Were we to uphold this lag-payroll legislation, one wonders if the employees would ever receive their lagged wages, or whether another one of the state's perennial "fiscal crises" . . . would justify deferring again, or even cancelling, the lagged wages when they eventually become due.

Id. at 774 (citation omitted).

We also rejected the state's challenge to jurisdiction on the ground that the lag payroll had been completed as of March 31, 1991, rendering the claims for declaratory and injunctive relief moot, limiting the plaintiffs' remedy to "retroactive money relief" and thus barring them under the Eleventh Amendment. Id. We reasoned that, although the money had already been withheld,

> [t]he lag payroll continues, and will continue, to impair the state's contractual obligations by deferring every salary check of each employee . . . until the employee leaves the service of the state, . . . and will, therefore, be enjoined.

Id. Since we found the injunction against the lag payroll to be a prospective remedy, we held that directing the defendants to return the withheld money was proper,

> since the eleventh amendment does not bar suits against state officers to enjoin violations of federal law, and any monies that will be restored to the plaintiffs from the state treasury are ancillary to the prospective relief which we order.

Id.

Surrogates II, 79 N.Y.2d 39, involved the state's attempt, via legislative amendments to the state Finance Law, 1991 N.Y. Laws, chs. 166 § 382 and 171 § 1, *reprinted in* N.Y. State Fin. Law § 200 (2-b) (McKinney Supp. 1992), to save $10.7 million and offset anticipated state budget shortfalls for the fiscal year 1991-92 by paying employees for nine rather than 10 days in each bi-weekly salary check over five payroll periods. The New York Court of Appeals, applying the rationale set forth by this Court in *Surrogates I*, struck down this legislation. The New York court held that the impairment of contract was substantial, as in *Surrogates I*, for essentially the same reasons. Surrogates II, 79 N.Y.2d at 46-47.

Defendants contest the relevance of *Surrogates I* to the issue of substantial impairment in the present case. They point out that the lag payroll here postpones receipt of only five days pay, compared to the 10 days involved in *Surrogates I*. Defendants neglect to mention, however, that the lag payroll in *Surrogates II* involved pay for only five days, exactly as in the present case. The New York Court of Appeals pointed out there that the amount withheld was 10 percent of an employee's earned salary for 10 weeks and this "is not an insubstantial impairment to one confronted with monthly debt payments and daily expenses for food and the other necessities of life." 79 N.Y.2d at 46-47. The same reasoning applies here. In sum, we agree with the district court that the reasoning of the *Surrogates* cases is clear and controlling. We therefore find, as a matter of law, that Chapter 947 effects a substantial impairment of contract.

The question still remains whether the enactment of Chapter 947 was "reasonable and necessary to further an important public purpose." United States Trust, 431 U.S. at 25. Defendants contend that the number of affected employees in this case, as well as the unusual severity of the financial crisis at the time Chapter 947 was enacted, make this legislation

"reasonable and necessary" even if the legislation at issue in *Surrogates I* or *II* was not.

Defendants argue first that Chapter 947 survives scrutiny because it "inflicts pain" on more people than the statutes at issue in the prior two *Surrogates* cases. At first blush, this seems to imply that a sufficient increase in the number of people whose contracts have been impaired will validate an otherwise unconstitutional statute, surely an unattractive proposition. But defendants' point is that placing the burden of coping with a fiscal crisis on the shoulders of only a few people, see *Surrogates I*, 940 F.2d at 773, is less fair than "spreading the pain" among many. We agree that the number of people involved is one factor to be considered on the issue of "reasonable and necessary," but we do not regard this factor as dispositive here.

As in the *Surrogates* cases, the pivotal question here is whether the lag payroll measure was reasonable and necessary notwithstanding the availability of other alternatives. On this question, the New York Court of Appeals appeared to flatly conclude in *Surrogates II* that a unilaterally imposed payroll lag could not be reasonable and necessary to accomplish the state's purposes:

> The choice of which revenue-raising or revenue-saving devices should be used is for others, not the courts, but the menu of alternatives does not include impairing contract rights to obtain forced loans to the State from its employees.

Surrogates II, 79 N.Y.2d at 47. Even if that language does not absolutely rule out the use of lag payrolls to fight budget crises, it certainly supports the view that the fiscal crisis must be much worse than that faced here to allow the use of such a device. This Court in *Surrogates I* did not go quite so far as

the New York Court of Appeals but did indicate that lag payrolls could only be used in extreme crises:

> It cannot be said that a lag payroll for only judicial employees was *essential* in order to finance the expansion of the court system. The state could have shifted the seven million dollars from another governmental program, or it could have raised taxes. We recognize that neither alternative would have been popular among politician-legislators, but that is precisely the reason that the contract clause exists—as a "constitutional check on state legislation." In fact, the lag payroll scheme smacks of the political expediency that *United States Trust Co.* warned of: "A governmental entity can always find a use for extra money, especially when taxes do not have to be raised."

Surrogates I, 940 F.2d at 773 (emphasis supplied) (citations omitted).

While we do not question that New York State faced a very difficult problem, our own prior decision in *Surrogates I*, supported by the reasoning of *Surrogates II*, leads us to conclude that the conditions that might justify the use of lag payrolls were not present here. Just as in *Surrogates I*, other (albeit unpopular) alternatives existed. Indeed, defendants' reply brief lists a number of measures that the state took to bridge an apparently greater budget gap in the following fiscal year. We agree with the district court that the difference in severity between the two fiscal crises is not enough to justify a different result.

Finally, the state's attempt to characterize the withholding as a "lump sum separation payment" rather than a lag payroll does not persuade us that the release of the withheld money is barred by the Eleventh Amendment or that the action is moot

because the withholding was completed as of March 31, 1991. In the words of the district court:

> The facts remain that the money was withheld, continues to be withheld, and will remain withheld until the employees leave State employ. The money "rolls over" each pay period, year to year, until the time of the employee's termination. Therefore, the claims for declaratory judgment and injunctive relief are not moot. As in *Surrogates I*, the injunctive relief sought is a prospective remedy, and any monies returned to . . . employees would be ancillary to this prospective relief and thus not barred by the Eleventh Amendment.

For the purpose of Eleventh Amendment analysis, we do not see any significant difference between the 10-day indefinite withholding of 10 percent of an employee's earned salary at issue in *Surrogates I* and the five-day withholding here.

In view of our disposition, it is unnecessary to address the Union's Fourteenth Amendment claim. As for defendants' remaining arguments, we have considered them and find them to be without merit. Accordingly, the judgment of the district court is affirmed.

Order of the Second Circuit Granting a Stay of the Mandate (2/1/93).

NOTICE OF MOTION FOR A STAY OF THE MANDATE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Number 92-7772

CONDELL

-v-

BRESS

Motion by

MICHAEL S. BUSKUS
Assistant Attorney General
NYS Department of Law
The Capitol
Albany, NY 12224
(Tel) 518-474-6697

Opposing Counsel:

NANCY E. BURRITT, ESQ.
c/o RICHARD E. CASAGRANDE
1168-70 Troy-Schenectady Road
Albany, New York 12212-2414
Tel (518) 785-1900 ext 241

Has consent of opposing counsel:

A. been sought? [X] Yes

B. been obtained? [X] No

Has service been effected? [X] Yes

Is oral argument desired? [X] No

Has argument date of appeal been set:

C. If Yes, enter date: appeal decided 1993

Judge or agency whose order is being appealed:

Scullin (N.D.N.Y.)

Brief statement of the relief requested:

Stay of mandate pending disposition of petition for a writ of certiorari

By: MICHAEL S. BUSKUS

Attorney for All Defendants-Appellants

Date January 21, 1993

UNITED STATES COURT OF APPEALS
FILED
JAN 22 1993
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is granted. The application for a stay is granted for 30 days only, strictly in accordance with the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure. No further stay will be granted by the panel.

Dated: 2/1/93

WILFRED FEINBERG
J. DANIEL MAHONEY
Circuit Judges

ROBERT F. PECKHAM
District Judge

UNITED STATES COURT OF APPEALS
FILED
FEB 1 1993
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

Judgment of the District Court (6/18/92)

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

RAND CONDELL, as President of Public Employees Federation, AFL-CIO

Plaintiff,

v.

MARIO CUOMO, *et al.*

Defendants.

CASE NUMBER: 91-CV-0057

[XX] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment be entered in favor of Plaintiff, RAND CONDELL, as President of the Public Employees Federation, AFL-CIO, pursuant to the Order of the Honorable Frederick J. Scullin, Jr., stating that Chapter 947 violates the contract clause of the

U.S. Constitution. The Defendants, MARIO CUOMO, as Governor of the State of New York; JOSEPH BRESS, as Executive Director of the Governor's Office of Employee Relations; NEW YORK STATE DEPARTMENT OF AUDIT AND CONTROL; EDWARD V. REGAN, as Comptroller of the State of New York; and the STATE OF NEW YORK, are hereby enjoined from continuing the effects and application of Chapter 947 and are directed to return the withheld monies, plus interest in the amount of seven percent calculated from March 31, 1991, to the Plaintiffs' within sixty days of this judgment.

GEORGE A. RAY
Clerk

BARBARA J. WOODFORD
(By) Deputy Clerk

U.S. DISTRICT COURT
N.D. of N.Y.
FILED
JUN 18 1992
____ O'CLOCK ____M
GEORGE A. RAY, CLERK
SYRACUSE

Opinion of the District Court (6/9/92).

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

JOSEPH E. MCDERMOTT, as President of the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO; and RAND CONDELL, as President of Public Employees Federation, AFL-CIO,

Plaintiffs,

v.

MARIO CUOMO, as Governor of the State of New York; JOSEPH BRESS as Executive Director of the Governor's Office of Employee Relations; New York State Department of Audit and Control; EDWARD V. REGAN, as Comptroller of the State of New York; and STATE OF NEW YORK,

Defendants.

91-CV-0057

APPEARANCES:

RICHARD E. CASAGRANDE, Attorney for Public Employees Federation [PEF], 1168-70 Troy-Schenectady Road, P.O. Box 12414, Albany, New York 12414-2414

Of Counsel:

Nancy L. Burritt, Esq.

ROBERT ABRAMS, Attorney General of the State of New York, The Capitol, Albany, New York 12224

Robert A. Siegfried, Esq., Ass't Attorney General

FREDERICK J. SCULLIN, JR., J.

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

This case is another in a series of similar cases involving challenges to legislation enacted by the New York State Legislature that effected "lag payrolls" on New York State employees. *See, e.g., Association of Surrogates and Supreme Court Reporters Within the City of New York*, 940 F.2d 766 (2d Cir. 1991) *cert. denied* ____ U.S. ____, 112 S.Ct. 936, ____ L.Ed.2d ____ (1992) [hereinafter *Surrogates I*]; *Association of Surrogates and Supreme Court Reporters Within the City of New York*, 79 N.Y.2d 39, 588 N.E.2d 51, 580 N.Y.S.2d 153 (1992) [hereinafter *Surrogates II*], *Association of Surrogates and Supreme Court Reporters Within the City of New York*, 78 N.Y.2d 143, 577 N.E.2d 10, 573 N.Y.S.2d 19 (1991); *In re Quirk v. Regan*, 148 Misc.2d 300, 565 N.Y.S.2d 422 (Sup. Ct. Albany County 1991). The plaintiffs, Civil Service Employees Association [hereinafter "CSEA"] and Public Employees Federation [hereinafter "PEF"] commenced this lawsuit in January 1991 to challenge certain legislation (1990 N.Y. Laws, ch. 947, §12 (codified as N.Y. State Fin. Law § 200 (2-a (a)) (McKinney Supp. 1992) [hereinafter "Chapter 947]) alleging that it violates their rights under Article I, Section 10, Clause 1 of the United States Constitution (Contract Clause). There-

after, on or about April 15, 1992, CSEA and the State of New York [hereinafter "State"] entered into a stipulation pursuant to Fed. R. Civ. P. [hereinafter "FRCP"] 41, resulting in CSEA's voluntary withdrawal, without prejudice, of its claim against the State. PEF, therefore, is the only remaining plaintiff in this action.

Jurisdiction is based upon 28 U.S.C. §1331.

II. BACKGROUND

The following facts are uncontested:

PEF represents approximately 50,000 State Executive branch employees in the Professional, Scientific and Technical Services bargaining unit. PEF entered into a collective bargaining agreement with the State for the stated period of April 1, 1988 through March 31, 1991. The agreement contained a provision stating that salary payments would be computed on the basis of ten working days. The agreement also provided for a negotiated lag pay limited to two weeks.

In December 1990, the State Legislature enacted Chapter 947, which resulted in the withholding of one-tenth of each plaintiff-employee's pay over a ten-week period, from December 27, 1990 through March 31, 1991. Thus, the State paid the employees for nine days' salary instead of ten days' salary for five successive pay periods. The five days withheld are to be repaid to the employees upon their termination from State employment, at their then applicable rate of pay.

As stated, this suit was commenced in January 1991. PEF thereafter moved this court for summary judgment, pursuant to FRCP 56. PEF requests that the court declare Chapter 947 unconstitutional, on the grounds that it violates the Contract Clause, and the Due Process Clause of the Fourteenth

Amendment to the Constitution. PEF also asks the court to enjoin the defendants from continuing to withhold their pay, and to direct the defendants to return the withheld pay to the plaintiff-employees. The State cross-moves for summary judgment, claiming that Chapter 947 was "reasonable and necessary" in light of the unprecedented fiscal crisis facing New York in the 1990-91 fiscal year and, therefore, does not violate the Contract Clause.[1] Oral argument was heard by the court in Syracuse, New York on April 24, 1992. After considering all of the pleadings, memoranda of law and oral arguments, the court finds that there are no genuine material facts in dispute in the present case, and nothing to materially distinguish this case from the other lag payroll cases. In view of the clear precedent, the court grants PEF's motion for summary judgment and denies the cross-motion by the State of New York.

III. DISCUSSION

On this motion for summary judgment, PEF bears the burden of demonstrating that there are no genuine issues of material fact. The substantive law determines which facts are material. An issue is genuine "[I]f the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, ____ (1986).

A. Contract Clause

The Contract Clause states, in pertinent part: "[N]o state shall . . . pass any . . . Law impairing the Obligation of

[1]For further explanation, see Defendants' Memorandum of Law in Support of its Cross-Motion at 2.

Contracts . . . ." U.S. Const. art. I, § 10, cl. 1. Despite the seemingly absolute language in the Clause, finding an "impairment" of contract is merely a threshold step toward "resolving the more difficult question whether that impairment is permitted under the Constitution." *Surrogates I* at 771 (quoting *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 21, 97 S.Ct. 1505, 1517, 52 L.Ed.2d 92, ____ (1977)).

In cases involving private contracts, courts must first determine whether the legislation causes a "substantial" impairment, and then, if it does whether the legislation is a "reasonable" means to a "legitimate public purpose" 431 U.S. at 22-23, 97 S.Ct. at 1519, 52 L.Ed.2d at ____. As the *Surrogates I* court explained:

> Generally, legislation which impairs the obligations of *private* contracts is tested under the contract clause by reference to a rational-basis test; that is, whether the legislation is a "reasonable" means to a "legitimate public purpose."

Surrogates I at 771 (citing *United States Trust Co.*, 431 U.S. at 22-23, 97 S.Ct. at 1517-1518, 52 L.Ed.2d at ____) (emphasis in the original). Furthermore, in considering legislation involving social and/or economic measures, courts will properly defer to legislative judgment in determining whether it be "reasonable and necessary." *Id.* However, courts are less deferential to a state's judgment of reasonableness and necessity when a state's legislation is self-serving and impairs the obligations of *its own* contracts. *Id.* at 771.

The Second Circuit, in *Surrogates I*, and the New York Court of Appeals, in *Surrogates II*, determined that legislation similar to that in the present case was unconstitutional.

The plaintiffs in both *Surrogates* cases were employees of the State Unified Court System whose collectively bargained-for rights were affected by State legislative action.

In *Surrogates I*, the New York State Legislature enacted legislation set forth in 1990 N.Y. Laws, ch. 190, § 375 authorizing the State to pay the affected employees nine days' salary rather than ten days' salary in each pay period for ten successive two-week pay periods. 940 F.2d at 769. Thus, employees were paid for a total of fifty instead of fifty-two weeks for the fiscal year ending March 31, 1991; the two weeks' withheld pay was to be repaid to the employees upon the termination of employment with the State at their then applicable rate of pay. *Id.* at 769. This measure was expected to save the State approximately $7 million.

As in the present case, the *Surrogates I* employees were parties to collective bargaining agreements with the State which included the provision that "bi-weekly salaries will be computed on the basis of ten working days." *Id.* at 770.

The Second Circuit held that there was a contractual impairment and that it was substantial. *Id.* at 771-72. The circuit court reasoned that the indefinite withholding of an amount equalling ten percent of an employee's pay over a twenty-week period could prevent the employee from meeting financial obligations such as mortgages, loans, credit cards, and the like. *See id.* at 772.

In so holding, the court rejected the defendants' contention that the substantial impairment was "reasonable and necessary" for the achievement of the State's goals, since "[t]he state could have shifted the seven million dollars from another governmental program, or it could have raised taxes." *Id.* at 773. "The contract clause, if it is to mean anything, must prohibit New York from dishonoring its existing contractual obligations when other policy alternatives are available." *Id.* at 774. The court remarked in

dictum: "Were we to uphold this lag-payroll legislation, one wonders if the employees would ever receive their lagged wages, or whether another of the state's perennial 'fiscal crises' . . . would justify deferring again, or even cancelling, the lagged wages when they eventually become due." *Id.* at 774 (citation omitted).

The Second Circuit also rejected the State's challenge to its jurdisdiction on the basis that the lag payroll had been fully effectuated as of March 31, 1991, thereby making the claims for declaratory and injunctive relief moot, limiting the plaintiffs' remedy to "retroactive monetary relief," and thus barred by the Eleventh Amendment. *Id.*

The court reasoned that, although the money had already been withheld, "[T]he lag payroll continues, and will continue to impair the state's contractual obligations by deferring every salary check of each employee for a period of two weeks, until the employee leaves the service of the state . . . and will, therefore, be enjoined." *Id.* at 774. And, since the court found the enjoinment of the lag payroll to be a prospective remedy, it held that directing the state defendants to return the withheld monies was proper,

> [S]ince the eleventh amendment does not bar suits against state officers to enjoin violations of federal law, and any monies that will be restored to the plaintiffs from the state treasury are ancillary to the prospective relief which we order . . . .

Id.

Surrogates II involved the State's attempt, via legislative amendments to the State Finance Law (1991 N.Y. Laws, chs. 166, § 382 and 171, § 1 (codified as N.Y. State Fin. Law § 200 (2-b) (McKinney Supp. 1992))) to save an al-

leged $10.7 million and offset anticipated State budget shortfalls for the fiscal year 1991-92 by paying employees for nine rather than ten days in each bi-weekly salary check over five payroll periods. 79 N.Y.2d 39, 588 N.E.2d 51, 580 N.Y.S.2d 153. The New York Court of Appeals, applying the same rationale as the Second Circuit in *Surrogates I*, struck down this legislation. *Id.* The court held that the impairment of contract was substantial, as in *Surrogates I*, for essentially the same reasons:

> The burden [the lag payroll] imposes is essentially the same as in *Association of Surrogates I* (*supra*). It results in withholding 10% of an employee's expected wages each week over a period of 10 weeks: salary which will not be paid until the employee leaves State service, which may be years in the future. That is not an insubstantial impairment to one confronted with monthly debt payments and daily expenses for food and the other necessities of life.

Surrogates II at 46, 588 N.E.2d at 54, 580 N.Y.S.2d at 156.

In comparing the facts of the present case to those in the *Surrogates* cases, this court finds that precedent is clear and controlling and therefore, as a matter of law, finds that Chapter 947 effects a substantial impairment of contract.

Thus, the only issue remaining for the court to decide is whether Chapter 947's enactment was "reasonable and necessary to further an important public purpose." *See United States Trust Co.* at 25.

The State contends that the number of affected employees in this case, and the severity of the fiscal crisis at the time Chapter 947 was enacted, make this legislation more reasonable and necessary than the situations that existed in

Surrogates I or *II*. The State attempts to distinguish this case from the *Surrogates* cases in that Chapter 947's effect is more widespread—i.e., instead of withholding pay from a small group of employees, it effected lag payrolls on the entire Executive branch. Carried to its conclusion, this argument implies that, if a constitutional violation affects a large group of people, rather than a small group—such action would be "reasonable" to further an important public purpose. It would seem that such an argument would be more relevant, if at all, to an equal protection claim, rather than to a Contract Clause claim. We are unable to find in *Surrogates I* or *II* where the number of persons affected was dispositive on the issue of "reasonable and necessary." On the contrary, both decisions turned on whether "payroll lagging" itself was a legitimate method to accomplish an important, lawful public purpose.[2] And, as the *Surrogates II* court concluded:

> [N]or is lagging reasonable and necessary to accomplish the State's purposes. The choice of which revenue-raising or revenue-saving devices should be used is for others, not the courts, but the menu of alternatives does not include impairing contract rights to obtain forced loans to the State from its employees.

Surrogates II at 47, 588 N.E.2d at 54, 580 N.Y.S.2d at 156.

As in the *Surrogates* cases, the pivotal question here is whether the measure (lag payroll) was reasonable and necessary—where there are other alternatives available. Here too, this court finds nothing of any import to distinguish this case from the *Surrogates* cases. Although the precise alter-

[2]Without addressing this issue, we assume for purposes of this argument that the State action was for an important, lawful public purpose.

natives may vary—there are alternatives. For example, the State could have utilized deficit spending, eliminated other programs and/or temporary commissions, or reduced mandated programs.

The State's attempt to distinguish the present situation from the other cases on the basis of the severity of the crisis also fails. Although there is some dispute as to what extent the fiscal situation that existed at the time of Chapter 947's enactment was foreseeable, the crisis cannot be said to be so much more severe than that in the *Surrogates* cases so as to justify a different result. This court finds that the severity of crisis issue is not critical; that other alternatives were available to the State, and thus, the lag payroll measure was not "reasonable and necessary."

Finally, the State's attempt at characterizing the withholding in this case as a "lump sum separation" rather than a lag payroll does not persuade the court that the repayment of the money is barred by the Eleventh Amendment, or that the action is moot due to the withholding having been effectuated as of March 31, 1991. The facts remain that the money was withheld, continues to be withheld, and will remain withheld until the employees leave State employ. The money "rolls over" each pay period, year to year, until the time of the employee's termination. Therefore, the claims for declaratory judgment and injunctive relief are not moot. As in *Surrogates I*, the injunctive relief sought is a prospective remedy, and any monies returned to PEF employees would be ancillary to this prospective relief, and thus not barred by the Eleventh Amendment. *See id.*

Furthermore, for the same reasoning as in *Surrogates I*, plaintiffs are entitled to interest on the withheld money at a rate of seven percent (reflecting the rate currently paid by the United States Treasury Department on tax refunds). *See*

772 F. Supp. 1412, 1417-1418 (S.D.N.Y., 1991) (on remand from Second Circuit Court of Appeals). The interest is to be computed from March 31, 1991, the last date on which checks reflecting the withholding of lagged monies were received. *See id.*

B. Fourteenth Amendment Claim

Inasmuch as the court determines that PEF is entitled to summary judgment on the basis of its Contract Clause claim, the court declines to address the constitutional question of whether Chapter 947 also violates the Fourteenth Amendment.

C. Defendant's Cross-Motion

For the reasons stated above in favor of the PEF's motion for summary judgment, the State's cross-motion for summary judgment is denied.

CONCLUSION

Chapter 947 violates the Contract Clause of the U.S. Constitution. The defendants are hereby enjoined from continuing the effects and application of Chapter 947 and are directed to return the withheld monies, plus interest in the amount of seven percent calculated from March 31, 1991, to the plaintiffs within sixty days of this judgment.

Dated: June 9th, 1992
Syracuse, New York

FREDERICK J. SCULLIN, JR.
UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT
N.D. OF N.Y.
FILED
JUN 11 1992
____ O'CLOCK ____ M
GEORGE A. RAY, CLERK
SYRACUSE

Order of the District Court Granting a Stay (7/30/92)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

JOSEPH E. MCDERMOTT, as President of the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO; and RAND CONDELL, as President of Public Employees Federation, AFL-CIO,

Plaintiffs,

against

MARIO CUOMO, as Governor of the State of New York; JOSEPH BRESS, as Executive Director of the Governor's Office of Employee Relations; New York State Department of Audit and Control; EDWARD V. REGAN, as Comptroller of the State of New York,

Defendants.

Civil Action No. 91-CV-0057

(Scullin, J.)

APPEARANCES:

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Robert A. Siegfried, Assistant Attorney General, of Counsel.

HONORABLE FREDERICK J. SCULLIN, JR.
United States District Court

Defendants having moved for a stay of the judgment in this action pending appeal pursuant to Rule 62 of the Federal Rules of Civil Procedure, and plaintiffs having opposed the motion and after hearing the arguments of counsel and upon due consideration:

ORDERED, that the judgment with respect to the monetary relief filed in this action on June 18, 1992 is stayed pending defendants' appeal.

DATED: Syracuse, New York
July 30th, 1992

FREDERICK J. SCULLIN, JR.
United States District Court Judge

U.S. DISTRICT COURT
N.D. OF N.Y.
FILED
JUL 30 1992
AT ____ O'CLOCK ____ m
GEORGE A. RAY, CLERK
SYRACUSE

Payroll Bulletin No. P-679. (1/2/91)

Office of the State Comptroller

PAYROLL BULLETIN

Subject: 1990-91 Salary Withholding and
Lump Sum Payment Program

Bulletin No.: P-679

Date: January 2, 1991

Chapter 947 of the Laws of 1990, the Deficit Reduction Legislation, provides for the withholding of salary for 5 days from all employees in 1990-91 and payment for this period at the time of separation from service.

The payment dates for payrolls will remain the same. In each of 5 consecutive payroll periods, beginning with Institution 20-Lag, 21-Current and Administration 21-Lag and 22-Current, payment will be for 9 defined days, as specified in the attached chart. At the end of the fifth payroll period, the payroll will revert to the previously established procedure, with payment on the regular previous schedule.

As a result of this procedure, one week will remain unpaid as defined below:

Institutions-Lag	- February 28-March 6, 1991
Institutions-Current	- March 14-March 20, 1991
Administration-Lag	- March 7-March 13, 1991
Administration-Current	- March 21-March 27, 1991

Employees will have salary due to them for time worked or charged to leave credits during this one week period.

The program applies to all Departments and agencies of the Executive Branch, including the State University of New York and the Senior Colleges of the City University of New York and, by election, to all employees of the Senate, the Assembly and all Joint Legislative Employers. The program does not apply to the Unified Court System or to authorities (15900, 21750, 28990, 55030).

The following groups of employees or types of payments are excluded from the withholding process:

a. all employees paid an hourly rate of less than $4.23 per hour.

b. all seasonal employees paid at an hourly rate.

c. all students at the colleges of the State University or City University of New York.

d. adjuncts and summer session payments in the colleges of the State University or City University of New York.

e. all extra service payments, either in an agency different from the employee's full-time employment or in the same agency.

You should continue to pay these employees all salary due for each pay period using the regular pay period dates.

IMPLEMENTATION OF THE WITHHOLDING FOR CURRENT EMPLOYEES

The salary withheld is regular salary only-basic annual salary plus all annual additional salary factors-location pay,

inconvenience, geographic differential, shift differential, premium overtime and occupational pay differentials. All other salary-such as pre-shift briefing, overtime, holiday pay, hazardous duty pay and CUNY Bonus-will not be withheld and is to be paid in full as earned.

The payment for nine-days for annual-salaried and bi-weekly salaried employees will be accomplished by changing the calculation of Normal Gross to a 9-day factor as described below. The Normal Gross for employees currently on the Workers' Compensation Supplemental System will also be changed automatically.

Pay Basis Pay	**9-Day Factor**
ANN, CAL, SAN, CYF	.034520
21P, CYP	.042857
10M	.041583
BIW	.90

For Part-time employees the calculation is annual salary (including annual salary factors) X 9-Day Factor X PT%.

The Normal Gross on your Payroll Register for Institution Period 19-Lag, 20-Current and Administration Period 20-Lag, 21-Current will be calculated using these factors. This is the amount that will be paid in the following period if no PR-75 is submitted.

Employees paid an hourly or daily rate who are subject to the withholding are to be paid for all hours or days worked during the nine days included in each payroll period.

Preparation of PR-75's

Salary and Status Changes

All salary and status changes are reported in the payroll period in which it occurs (using the new payroll period dates on the attached chart) and the Gross (Add) is calculated based on the full (10-day Normal) daily rate of salary owed for each of the nine days being paid in the period.

Miscellaneous Payments

All payments of overtime, holiday pay, pre-shift briefing pay, etc., should be paid in full in the usual manner. For transactions which use a daily rate, (e.g. holiday pay or lost time) you must use the biweekly computed at the 10-day factor. In computing the Gross (Add) for the period, use the 9-day Normal Gross from the previous payroll and add or subtract the amounts of the miscellaneous transactions.

Payroll Deductions

The reduction in salary may affect employees who receive a small net check. Many of these employees have large credit union deductions. These employees may wish to change their deduction, or to enroll in direct deposit instead, if they are eligible. We are, however, changing the order of cancellation of deductions to drop credit union deductions before any others.

Return to Normal 10-Day Payment

The Normal Gross Salary on the payroll for Institution 23-Lag, 25-Current and Administration 25-Lag, 26-Current will automatically revert to the 10-day factor. Use the 10-day Normal Gross for preparation of payrolls for Institution 25-Lag, 26-Current and Administration 26-Lag, 1-Current.

IMPLEMENTATION OF THE WITHHOLDING FOR NEW EMPLOYEES

Employees hired after Institution Period 20-L/21-C or Administration 21-L/22-C will also have one week's pay withheld. The employee will be paid for 9 days in each of the first five payroll periods.

These employees should be reported initially with the appropriate appointment code and the additional transaction code LAG BASIS. The Normal Gross will automatically be computed with the 9-Day Factor.

Group 1 Complete blocks #01 through 06 and the following:
Class B #07 Transaction Code—enter the appropriate appointment transaction code and complete the block requirements for that code
23 Gross (Add)
26 Time Paid
45 Addt'l Trans Code—enter LAG BASIS

In the sixth payroll period after appointment, the transaction code REM LAG must be reported. This will restore the Normal (Gross) calculation back to the 10-day factor.

Group 3 Complete blocks #1 through #06 and the following:

Class B #07 Transaction Code—enter REM LAG
12 Transaction
Effective Date—enter the first day of the period
23 Gross (Add)
24 Normal (Deduct)
26 Time Paid

DETERMINATION AND REPORTING OF DAYS DUE

Employees will receive payment for any days due for the one week period of withholding at the time of separation.

In order to prepare for this future payment agencies must determine the actual days, in full time equivalent days, due to each employee for the one-week period of salary withholding. Employees must have worked, or charged time to leave credits, in order to be entitled to payment. For example:

1. A full-time employee who worked all days during the period will be due 5 days pay.

2. A half-time employee who worked all days during the period will be due 2.5 days pay.

3. An employee on sick leave at half-pay for the period will be due 2.5 days pay.

4. A full-time employee who worked 3 days in the period and had 2 days lost time will be due 3 days pay.

5. An hourly employee who worked 40 hours during the period will be due 5 days pay.

6. An employee working 80% who was on vacation and charged leave credits for the entire period will be due 4 days pay.

Payroll Offices must be sure to accumulate and complete time reports for all employees for the week of salary withholding. OSC is developing procedures for reporting this information to us. You will receive further information on this process.

PAYMENT UPON SEPARATION FROM SERVICE

When an employee separates from service (resignation, termination, retirement, death, etc.), the employee will be paid for the days withheld at the salary (basic annual and annual salary factors) received at the time of separation. A new transaction code—SALARY LSP—has been established to report this payment.

Transaction Code: SALARY LSP

Group 3	Complete blocks #01 through #06 and the following:	
Class B	#07 Transaction Code	—enter SALARY LSP. If this block is filled use the first available Addt'l Trans Code block.
	23 Gross (Add)	
	24 Normal (Deduct)	—if applicable
	49 Misc Block A	—enter number of days due for the withholding period in full days for both full time and part-time employees.

50 Misc Block B —enter the amount of the payment based on 1/10th of the biweekly salary computed on basic annual and annual salary factors X number of days.

Questions concerning this bulletin should be directed to your Audit Supervisor.

SALARY DEFERRAL PROGRAM
9-DAY PAYROLL SCHEDULE

Lag Payrolls

Pay Period	Submission Date	Check Date	New Pay Period Dates	Regular Pay Period Dates
Institutions				
20-L	Jan 10	January 24	Dec 27-Jan 8	Dec 27-Jan 9
21-L	Jan 25	February 7	Jan 9-Jan 21	Jan 10-Jan 23
22-L	Feb 7	February 21	Jan 22-Feb 2	Jan 24-Feb 6
23-L	Feb 22	March 7	Feb 3-Feb 14	Feb 7-Feb 20
24-L	March 8	March 21	Feb 15-Feb 27	Feb 21-March 6
*25-L	March 21	April 4		March 7-March 20

*Return to Normal 10-day payment on a two-week lag.
February 28 to March 6, 1991 remains unpaid.

Administration				
21-L	Jan 18	January 30	Jan 3-Jan 15	Jan 3-Jan 16
22-L	Feb 1	February 13	Jan 16-Jan 28	Jan 17-Jan 30
23-L	Feb 14	February 27	Jan 29-Feb 9	Jan 31-Feb 13
24-L	March 1	March 13	Feb 10-Feb 21	Feb 14-Feb 27
25-L	March 15	March 27	Feb 22-March 6	Feb 28-March 13
*26-L	March 29	April 10		March 14-March 27

*Return to Normal 10-day payment on a two-week lag.
March 7 to March 13, 1991 remains unpaid.

SALARY DEFERRAL PROGRAM
9-DAY PAYROLL SCHEDULE

Current Payrolls

Pay Period	Submission Dates	Check Date	New Pay Period Dates	Regular Pay Period Dates
Institutions				
21-C	Jan 10	January 24	Jan 10-Jan 22	Jan 10-Jan 23
22-C	Jan 25	February 7	Jan 23-Feb 4	Jan 24-Feb 6
23-C	Feb 7	February 21	Feb 5-Feb 16	Feb 7-Feb 20
24-C	Feb 22	March 7	Feb 17-Feb 28	Feb 21-March 6
25-C	March 8	March 21	March 1-March 13	March 7-March 2
*26-C	March 21	April 4		March 21-April

*Return to Normal 10-day Payment on a two-week lag.
March 14 to March 20, 1991 remains unpaid.

Administration				
22-C	Jan 18	January 30	Jan 17-Jan 29	Jan 17-Jan 30
23-C	Feb 1	February 13	Jan 30-Feb 11	Jan 31-Feb 13
24-C	Feb 14	February 27	Feb 12-Feb 23	Feb 14-Feb 27
25-C	March 1	March 13	Feb 24-March 7	Feb 28-March 1
26-C	March 15	March 27	March 8-March 20	March 14-March 2
* 1-C	March 29	April 10		March 28-April 1

*Return to Normal 10-day Payment on a two-week lag.
March 21 to March 27, 1991 remains unpaid.

No. 92-1410

Supreme Court, U.S.
FILED
MAR 24 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1992

JOSEPH BRESS, as Executive Director of the Governor's Office of Employee Relations; N.Y.S. DEPARTMENT OF AUDIT & CONTROL; STATE OF NEW YORK; MARIO CUOMO, as Governor of the State of New York; EDWARD V. REGAN, as Comptroller of the State of New York,

Petitioners,

against

RAND CONDELL, as President of the Public Employees Federation, AFL-CIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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(2922—LC9-419—1993)

Questions Presented

1. Whether in the face of available alternative measures that violate neither law nor contract, the Contract Clause permits the State of New York to legislatively impair a collective bargaining agreement between the State and a union representing certain State employees by withholding earned wages.

2. Whether the order to repay wages withheld pursuant to the challenged legislation was merely ancillary to the prospective relief awarded enjoining the continued application of the statute and thus not in violation of the Eleventh Amendment.

3. Whether, in light of the state court judgment on independent grounds ordering repayment of salary withheld pursuant to the challenged legislation, any Eleventh Amendment claim petitioners might have should be considered by this Court in the exercise of its certiorari jurisdiction.

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No. 92-1410

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992.

JOSEPH BRESS, as Executive Director of the Governor's Office of Employee Relations; N.Y.S. DEPARTMENT OF AUDIT & CONTROL; STATE OF NEW YORK; MARIO CUOMO, as Governor of the State of New York; EDWARD V. REGAN, as Comptroller of the State of New York,

Petitioners,

against

RAND CONDELL, as President of the Public Employees Federation, AFL-CIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief in Opposition to the Petition for a Writ of Certiorari

Statement of the Case

The respondent PEF is a public sector labor union and the exclusive bargaining representative for employees of the executive branch of the State of New York in the Professional, Scientific and Technical Services ("PS&T") bar-

gaining unit. (J.App.10-11)[1] PEF and the State of New York entered into a collective bargaining agreement for the PS&T unit for the stated duration of April 1, 1988 through March 31, 1991. (J.App.35) In the absence of a negotiated successor agreement, the 1988-91 agreement continues in effect under New York law. (J.App.39) The collective bargaining agreement contains a provision requiring that salary payments be computed on the basis of ten working days, a provision setting forth designated annual salary levels, and a provision for a negotiated "lag pay" limited to two weeks. (J.App.35-36)

In December 1990, the State Legislature enacted Chapter 947 of the Laws of 1990 (New York *State Finance Law* § 200 (2-a [a])) which imposed a five-day lag payroll on executive branch employees of the State of New York, including the employees represented by PEF.[2] (J.App.36-37) Pursuant to Chapter 947, the affected employees received only nine-tenths of their salary for each of

[1]References to "J.APP. _____" are to pages of the joint appendix in the Court of Appeals. References to "P.APP. _____" are to the pages of the appendix to the Petition. References to "R.APP. _____" are to the pages of the appendix in this brief in opposition to the petition.

[2]This was not the first lag payroll imposed on state employees covered by collective bargaining agreements. In May 1990, the state legislatively imposed a 10-day lag payroll on non-judicial employees of the state Unified Court System. 1990 N.Y. Laws, ch. 190 §375. The lag payroll was imposed for the stated purpose of raising $7 million to eliminate a budget shortfall. This legislation was challenged by various unions representing these employees. The Court of Appeals for the Second Circuit held that the legislation violated the Contract Clause, enjoined the operation of the statute and ordered repayment of the lagged salary, plus interest. *Association of Surrogates and Supreme Court Reporters Within the City of New York v. State of New York*, 940 F.2d 766 (2d Cir. 1991), *cert. denied* _____ U.S. _____, 112 S. Ct. 936, 117 L.Ed.2d 107 (1992) ("*Surrogates I*"). The petition for writ of certiorari in *Surrogates I* was only on Eleventh Amendment grounds.

(Footnote continued on next page.)

five bi-weekly periods between December 27, 1990 and March 31, 1991. (J.App.37) Pursuant to Chapter 947, the withheld compensation will not be released until the employee leaves state employment, whenever that might be. (J.App.37-38) In addition, all new employees hired after December 27, 1990 are subject to this lag during their first ten weeks of employment. (J.App.57)

The respondent acknowledges that the state faced a budget deficit in fiscal year 1990-91, a deficit estimated by petitioners to be $1,005 million in November 1990. (J.App.94,187) In the 1987-88, 1988-89 and 1989-90 fiscal years the state faced budget deficits of $.133 billion, $.529 billion and $.775 billion respectively. (J.App.87, 171) The state budgets in these fiscal years were balanced by use of tax and revenue anticipation notes and/or one-shot revenues and transfers. (J.App.87, 171) This borrowing was required even though the state implemented a June 1988 "deficit reduction plan" in addition to the November 1990 legislation at issue in this case. (J.App.171)

It is important to understand, however, that in November 1990, it was the Governor's stated intention to eliminate the budget deficit without issuing tax and revenue anticipation notes, levying new taxes, raising rates on existing taxes, or

(Footnote continued.)

In 1991, the State again attempted to impose a lag payroll on employees of the state Unified Court System by legislation. 1991 N.Y. Laws, chs. 166 §382 and 171 §1, New York *State Finance Law* §200 (2-b) (McKinney's Supp. 1992). This legislation, creating a five-day lag, was intended to save $10.7 million to offset anticipated state budget shortfalls for fiscal year 1991-92. The New York Court of Appeals struck down this legislation as violative of the Contract Clause and permanently enjoined its enforcement. *Association of Surrogates and Supreme Court Reporters Within the City of New York v. State of New York*, 79 N.Y.2d 39, 580 N.Y.S.2d 153 (1992) ("*Surrogates II*").

laying off additional executive branch employees. (J.App.94, 187-89) These options, singly or in combination, while available to petitioners, were rejected in November 1990 by the Governor as "unwise fiscal policy" (J.App.175, 188), as causing "further damage to the State's competitive position vis-a-vis other states" (J.App.189), or as having "unacceptable" adverse impacts on state programs and employees. (J.App.192)

Despite the Governor's deficit reduction plan, including the enactment of Chapter 947 and the subsequent collection of approximately $128 million in lagged wages from executive branch employees, the state nevertheless issued tax and revenue anticipation notes to close an actual budget gap of $1.081 billion at the end of the 1990-91 fiscal year. (J.App.87-98, 99, 175, 194-95)

Decision of the District Court

The district court declared that Chapter 947 violates the Contract Clause, and enjoined petitioners ". . . from continuing the effects and application of Chapter 947 and . . . directed [petitioners] to return the withheld monies, plus interest in the amount of seven percent calculated from March 31, 1991 to the respondent within sixty days of this judgment." (P.App.A18) Judgment was entered on June 18, 1992.[3]

The district court found, based on the precedents established by *Surrogates I* and *Surrogates II*, that Chapter 947 effected a substantial impairment of contract (P.App.A26) and that the legislation was neither reasonable nor necessary because there were other available legal alternatives.

[3]The district court granted petitioners' application for a stay of that portion of the judgment that required the return of the lagged salary within sixty days, pending the appeal to the Court of Appeals. (J.App.318-19)

(P.App.A27) The district court also rejected the petitioners' Eleventh Amendment arguments, finding that the requested injunctive relief was a prospective remedy and that the return of withheld salary would be relief ancillary to that prospective remedy. (P.App.A28)

Decision of the Court of Appeals

The Court of Appeals, relying on its decision in *Surrogates I* and on the decision of the New York State Court of Appeals in *Surrogates II*, found that the challenged legislation did effect a substantial impairment of contract and that the impairment was in violation of the Contract Clause. (P.App.A10,A12) The court affirmed the judgment of the district court.[4] The Court of Appeals stated that the pivotal question was "whether the lag payroll measure was reasonable and necessary notwithstanding the availability of other alternatives." (P.App.A11) The availability of other alternatives, even if they were, as described by the court, "unpopular", and the court's assessment that the state's fiscal crisis was not an "extreme crisis," led to the court's conclusion that "...the conditions that might justify the use of lag payrolls were not present here." (P.App.A12)

The Court of Appeals also rejected the state's attempts to characterize the withholding as a "lump sum separation payment" rather than a lag payroll for purposes of its Eleventh Amendment defense. The court found that there was no basis to distinguish Chapter 947's five-day withholding from the ten-day withholding in *Surrogates I*. (*Id.*) The court held that the release of the withheld salary was not

[4]In response to a motion by petitioners, the Court of Appeals stayed the issuance of its mandate for thirty days pursuant to *FRAP* R.41(b). (P.App.A16)

barred by the Eleventh Amendment because it was ancillary to the prospective injunctive relief ordered. (P.App.A13)

ARGUMENT

POINT I

The Court of Appeals correctly held that Chapter 947 violates the contract clause. There is no basis for the exercise of this Court's discretionary jurisdiction.

The respondent submits that the "special and important reasons" required by the rules of this Court for granting a petition for a writ of certiorari are not present in this case. Respondent's contention is supported first by the fact that this Court denied the petition for writ of certiorari in *Surrogates I*, a case presenting factual and legal issues virtually identical to those in the present action. *Surrogates I*, *supra*, 940 F.2d 966, *cert. denied*, ____ U.S. ____, 112 S.Ct. 936. While the petition in *Surrogates I* raised only the claim that the order of repayment of lagged salary violated the Eleventh Amendment, the fact that petitioners failed to raise contract clause claims and the fact that this Court declined to hear the same Eleventh Amendment claims presented in this case support a denial of this petition.

In addition, a principal purpose of the Supreme Court's certiorari jurisdiction is to resolve conflicts among the Circuit Courts of Appeals or between state courts of last resort and the Circuit Courts of Appeals on federal questions. *Braxton v. U.S.*, ____ U.S. ____, 111 S.Ct. 1854, 1857 (1991); *Rules of the Supreme Court*, R. 10.1(a).

This case presents absolutely no judicial conflicts concerning the constitutionality of New York's lag payrolls. All the federal court challenges to New York's legislatively imposed lag payrolls in 1990 and 1991 have been within the Second Circuit. *Surrogates I, supra; Condell v. Bress*, ____ F.2d ____ (2nd Cir. January 8, 1993). (P.App.A1) Therefore, there is no conflict between the Circuit Courts of Appeals "on the same matter." *Rules of the Supreme Court*, R. 10.1(a). Nor is the Court of Appeals' January 8, 1993 decision in conflict with a decision of a state court of last resort. The New York Court of Appeals has also held that the lag payroll legislation violates the Contract Clause. *Surrogates II, supra*, 79 N.Y.2d 39, 580 N.Y.S.2d 153.

There is no real dispute that Chapter 947 impairs the collective bargaining agreement between PEF and the State. The effect of Chapter 947 on this collective bargaining agreement was the subject of a contract grievance arbitration in *Matter of Arbitration Between Public Employees Federation and State of New York*. (R.App.A1) In that case, the arbitrator ruled that the collective bargaining agreement was breached by Chapter 947. The award held that the State violated "the Agreement between the parties when the Governor submitted, the Legislature passed, and the Governor signed and implemented [Chapter 947]." (R.App.A ____) The arbitrator's decision and award were confirmed by a judgment of the State Supreme Court on July 30, 1992. *Matter of Shafer v. Bress*, Index No. 4282-92 (Sup. Ct., Albany County, July 24, 1992). (R.App.A ____) While the State has appealed this judgment, there can be no doubt that Chapter 947 impaired contract rights existing under the PEF/State agreement.

Both the district court and the Court of Appeals found, based on *Surrogates I* and *Surrogates II*, that Chapter 947 effected a substantial impairment of the contract between PEF and the State and that the impairment was not reasonable and necessary to further an important public purpose. *Surrogates I, supra*, 940 F.2d 766; *Surrogates II, supra*, 79 N.Y.2d 39, 580 N.Y.S.2d 153. The petitioners argue that this petition should be granted because the Court of Appeals failed to properly construe the scope of the Contract Clause. The petitioners contend that the severity of the fiscal crisis and the minimal impact of the "wage deferral" require a finding that Chapter 947 does not violate the Contract Clause.[5] Respondent submits, to the contrary, that the impairment was substantial and that it was not reasonable and necessary to balance the state budget for the 1991-92 fiscal year.

In *Surrogates I*, the Court of Appeals held that 1990 legislation which imposed a ten-day lag payroll on the non-judicial employees of the New York State Unified Court System impaired the contract rights created by the collective bargaining agreements between the respondent labor unions and the state. *Surrogates I, supra*, 940 F.2d 766. In so holding, the court noted that the lag, as implemented, withheld one day's pay for each of ten bi-weekly pay periods, so that the employees were paid for only nine out of ten working days for each of those pay periods. *Id.* at 769. The court noted the existence of provisions in the collective bargaining agreements which required that bi-weekly sal-

[5]It must be noted that while the petitioners now claim that neither *Surrogates I* nor *Surrogates II* involve a "genuine fiscal crisis" (Petition, p. 15), these same petitioners argued in both cases that in fact there was a fiscal crisis requiring the legislative impairment of public employee contracts.

aries be computed on the basis of ten working days and the State's history of imposing lag payrolls only by negotiated agreement. *Id.* at 769-770, 772. The court also noted the New York Court of Appeals' holding that the collective bargaining agreements become valid when ratified (*Association of Surrogates and Supreme Court Reporters Within the City of New York v. State of New York*, 78 N.Y.2d 143, 573 N.Y.S.2d 19 (1991),[6] and held that the lag legislation impaired the contractual rights contained in those agreements. *Id.* at 771.

The Court of Appeals rejected the State's claim that the 1990 ten-day lag was insubstantial, pointing out that the lag was long-term, that it would not be repaid until separation from service ("perhaps 45 years"), and that the affected employees depend upon their full paycheck to meet their expenses. *Surrogates I, supra*, 940 F.2d at 772. As the court noted, "it would be inconsistent for us to accept the petitioners' argument that this impairment was necessary because of a governmental fiscal crisis, and to do so by disregarding the personal fiscal crisis that the lag payroll would create." *Id.* The court found further support for the conclusion that the impairment was substantial in the existence of the specific provision in the contracts for bi-weekly salary payments computed on a ten-day basis, particularly in light of the state's past history of imposing lag payrolls only by agreement. *Id.*

[6]The New York Court of Appeals issued this decision upon a certified question referred to it by the Court of Appeals in *Surrogates I*. The question was whether the compensation provisions of the multi-year collective bargaining agreement were contingent upon annual legislative approval. The New York Court of Appeals held that the obligations of multi-year contracts become binding upon initial legislative approval. *Association of Surrogates, supra*, 78 N.Y.2d at 156, 573 N.Y.S.2d at 25.

In *Surrogates II*, the New York Court of Appeals held that 1991 legislation imposing a five-day lag payroll on non-judicial employees of the Unified Court System impaired contract rights of the affected employees. The contract rights impaired by the 1991 legislation were the same as those involved in *Surrogates I*: the right to bi-weekly pay calculated on the basis of ten working days. *Surrogates II, supra*, 79 N.Y.2d at 43-44, 580 N.Y.S.2d at 154. The New York Court of Appeals rejected the state's argument that a five-day lag was insubstantial. The five-day lag, according to the court:

> . . . results in withholding 10% of an employee's expected wages each week over a period of 10 weeks: salary which will not be paid until the employee leaves State service, which may be years in the future. This is not an insubstantial impairment to one confronted with monthly debt payments and daily expenses for food and other necessities of life. [*Surrogates II, supra*, 79 N.Y.2d at 46-47, 580 N.Y.S.2d at 156.]

The five-day deferral under Chapter 947 cannot be considered insubstantial because it amounts to "only 1.92 percent" of each employee's annual salary, as petitioners argue. It is also ten percent of each employee's salary in each of the five payroll periods affected. The employees affected by Chapter 947, no less than the employees in *Surrogates I* and *Surrogates II*, depend on full paychecks to meet expenses. The Court of Appeals properly held that, under *Surrogates I* and *Surrogates II*, the impairment was substantial.

Chapter 947 must also be held to effect a substantial impairment of the collective bargaining agreement between PEF and the State because of its impact on the bargaining relationship between the parties. As noted in *Surrogates I*, not only did the contract require bi-weekly salaries to be paid on a basis of ten working days, but the petitioners have, in fact, *negotiated* changes in this provision with PEF in 1982 and 1988. (J.App.14-15) *Surrogates I, supra*, 940 F.2d at 772. The impairment, therefore, is of both individual rights and collective rights. The individual is entitled to full payment of salary under the contract. The employees, collectively, are entitled to rely on the terms of their collective bargaining agreement and the benefits obtained through negotiation.

Having found a substantial impairment of contract, it is necessary to determine whether that impairment was "reasonable and necessary to further an important public purpose." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977). The question is whether, without modifying the obligation at all, the petitioners could have adopted alternative means of achieving their goals. *Id.* at 29-30. Even a more moderate modification of the contract obligation is inappropriate where a state's goal could be achieved absent any such modification. *Id.* at 30-31.

Petitioners continue to assert that the public purpose in this case was sufficient "in the context of a 1.92% wage deferral, to satisfy the test of the Contract Clause that the means chosen are reasonable and necessary in light of the magnitude of the public need." (Petition, p.14) Quite understandably, the petitioners attempt to paint the public purpose at issue with the broadest possible brush. They assert that "[t]he public interest in continuing vital governmental

services . . . as well as the severity of this budget crisis" constitute the public purpose at issue. (Petition, pp. 13-14)

The public purpose established by the record in this case, however, was to balance the 1990-91 state budget. (J.App.187) It is not disputed that the public has an interest in a balanced budget. The constitutional infirmity here is that petitioners impaired contractual obligations to obtain a $128 million loan from executive branch employees to remedy a budget deficit of more than $1 *billion* in the face of alternatives which would not have impaired petitioners' contractual obligations.[7] (J.App.187, 190)

Petitioners argued to the Court of Appeals that in November 1990 there was "no realistic alternative" to the five-day lag. Chapter 947 did include measures intended to reduce the budget deficit other than the five-day lag. (J.App.191)

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[7]Petitioners state, at page 15 of the petition, that Chapter 947 "involved $128 million in direct reductions in expenditures for FY 90-91..." and that $50 million is in controversy in this case. Petitioners also state that all other public employee unions had $78 million in salary withheld, implying that $50 million in salary was directly withheld from PS&T unit members. This is inaccurate. Respondent does not dispute the accuracy of the $128 million total from salary withholding. The share of that $128 million from PS&T unit salaries was approximately $38 million. The $50 million figure can only be arrived at if interest on the $38 million is included.

Petitioners also state that other public employee unions subject to Chapter 947 have settled their lawsuits against the state as part of successor collective bargaining agreements. What petitioners fail to note, however, is that at least two of the contract settlements involved the repayment by April 1, 1995 of all salary withheld pursuant to Chapter 947 and an agreement that Chapter 947 would not be applied to new members of these bargaining units. This can only be seen as clear evidence that what the State faced in November and December 1990 involved balancing the state budget rather than the kind of deep fiscal crisis that could legitimately be compared to the "Great Depression."

This did not leave the petitioners without any legal alternatives to contract impairment. The problem with petitioners' argument is that the obvious alternative, short term borrowing, followed by either tax increases, program cuts or layoffs to repay such a loan was rejected as unwise by the Governor. The alternative of trying to negotiate a lag payroll, as the State had done with PEF in 1982 and 1988, and which is required under New York *Civil Service Law* §§200 *et seq.*, was also apparently rejected by the Governor. The petitioners did what the courts have clearly held a state cannot do: they placed impairment of contract on a par with any other policy alternative. *United States Trust, supra,* 431 U.S. at 30-31.

The application of the "reasonable and necessary" test is different in cases where the state impairs its own contract than in other cases. Where the state impairs its own contract, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." *United States Trust, supra,* 431 U.S. at 26, *Surrogates I, supra,* 940 F.2d at 771-72.

In the context of monetary obligations provided for by contract, it is axiomatic that a state can always envision an extra use for its money. *Id.* However, if a state were allowed to choose to reduce its contractual financial obligations whenever it wanted to spend money on what is regarded as an important public purpose, the Contract Clause would provide no protection at all. *Id.* at 26. As stated in *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*:

> When a State itself enters into a contract, it cannot simply walk away from its financial obligations. In almost every case, the Court has held a governmen-

> tal unit to its contractual obligations when it enters financial or other markets. [citations omitted] [459 U.S. 400, 412, n. 14 (1983).]

In support of their arguments as to the reasonableness and necessity of Chapter 947, petitioners point to an allegedly similar situation in which the New York Court of Appeals upheld wage-freeze legislation against a contract clause challenge. *Matter of Subway-Surface Supervisors Assn. v. New York City Transit Authority*, 44 N.Y.2d 101, 404 N.Y.S.2d 323 (1978). (Petition, p.14) As the New York Court of Appeals noted in rejecting this same argument in *Surrogates II*, *Subway-Surface* did not involve a "similar" situation and does not require a finding that Chapter 947 is a permissible contract impairment. *Surrogates II*, *supra*, 79 N.Y.2d at 47, 580 N.Y.S.2d at 156-57.

The state legislation challenged in *Subway-Surface* "suspended" a *prospective* salary increase for supervisory personnel employed by the New York City Transit Authority in the face of a legislatively declared financial emergency. 44 N.Y.2d at 106, 404 N.Y.S.2d at 326. The challenged legislation provided that the wage increase would be suspended for up to one year, unless specifically extended by a review board, but in no event longer than the duration of the emergency. *Id.* This is a very different situation from the impairment created by Chapter 947. First, it involved the loss of future wage increases rather than actual earned wages. Second, as the New York Court of Appeals noted:

> Unlike this case [*Surrogates II*] where earned salaries may be deferred for indefinite periods of perhaps 25, 30 or 40 years, until the employee leaves State service, the *Financial Emergency Act* consid-

> ered in *Subway-Surface* was a temporary measure. . . . It postponed a future benefit to employees for one year only or until the emergency was declared over [citation omitted]. [*Surrogates II, supra*, 79 N.Y.2d at 47, 580 N.Y.S.2d at 157.]

The judicial decisions which are the most applicable to the present case are those which invalidated lag payroll legislation enacted in New York in 1990 and in 1991: *Surrogates I, supra; Surrogates II, supra*; *Quirk v. Regan*, 148 Misc.2d 306, 565 N.Y.S.2d 425 (Sup. Ct. Albany Co. 1991); and *McDermott v. Unified Court System of the State of New York*, 1991 WL 302648 (Sup. Ct. Albany Co., June 21, 1991). Each and every court that considered the legislation found it invalid.

Petitioners claim that there is a material difference in the economic situation surrounding enactment of Chapter 947 (enacted in December 1990), as compared to the circumstances surrounding enactment of the May 1990 lag payroll legislation for court employees, which renders *Surrogates I* inapplicable to the present case. Petitioners also assert that the Contract Clause violation in *Surrogates I* was based on two factors very different from the facts of this case: that only $7 million out of a judiciary budget of almost $1 billion was gained by lagging only judicial employees and that the purpose of the lag was to expand the court system.

The very language of *Surrogates I*, however, precludes such attempted distinctions. In addressing the 1990-91 fiscal year, the court referred to the "fiscal crisis" and also to "the State's perennial fiscal crisis". *Surrogates I, supra*, 940 F.2d at 769, 774. *Surrogates I* was not based solely upon the concern that the State was financing an expansion of the

court system via the lag payroll, as evidenced by the fact that the Court of Appeals expressly assumed, "for the sake of argument", that the maintenance and expansion of the court system constitutes an important public purpose, and then proceeded to find that the means chosen by the state were not "necessary" to the achievement of the stated goals. 940 F.2d at 773. As was clearly pointed out in *Surrogates I*, the 1990 court employees' lag was to be used both to expand the court system and to save $7 million: in other words, to balance the Judiciary budget. *Surrogates I, supra*, 940 F.2d at 768. This is precisely the public purpose at issue in this case.

Furthermore, in *Surrogates II*, the New York Court of Appeals invalidated lag legislation enacted in July 1991, rejecting the State's arguments that such legislation was justified by the fiscal circumstances of the 1991-92 fiscal year. *Surrogates II, supra*, 79 N.Y.2d at 47, 580 N.Y.S.2d at 156. Therefore, between *Surrogates I* and *Surrogates II*, the fiscal circumstances of fiscal year 1990-91 and the first part of fiscal year 1991-92 have been deemed an inadequate basis for justifying the state's imposition of a lag payroll on state employees. Indeed, petitioners themselves regard the fiscal circumstances relevant to enactment of Chapter 947 as identical to those relevant to the 1991-92 fiscal year lag legislation which was the subject of *Surrogates II*. Petitioners submitted virtually identical affidavits outlining the state's fiscal circumstances to the courts in this case, in *Surrogates II* and in litigation brought by another public employee union challenging Chapter 947. (J.App.89-90) Chapter 947, therefore, cannot be justified by the surrounding fiscal circumstances despite petitioners' rhetoric about the Great Depression and President Clinton's February 17, 1993 address to a joint session of Congress.

In sum, in accordance with the court decisions in *Surrogates I, Surrogates II, Quirk* and *McDermott,* Chapter 947 must, as the courts below held, be invalidated. Chapter 947 is not "reasonable and necessary". Alternatives did exist whereby the state could have achieved its goals without impairing respondent's contract rights. The state's purpose in enacting the legislation here at issue clearly was to raise revenue, create savings and/or cut costs, since the legislation was part of the 1990 Budget Bill. As the Court of Appeals held, the state could have achieved this purpose sufficiently without modifying its contract obligations at all. According to petitioners' own statements, impairment of contract was chosen over other legal, though less appealing, alternatives as a means to raise $128 million in an attempt to balance the state budget. As the New York Court of Appeals stated in *Surrogates II*: "[t]he choice of which revenue-raising or revenue-saving devices should be used is for others, not the courts, but the menu of alternatives does not include impairing contract rights to obtain forced loans to the State from its employees." 79 N.Y.2d at 47, 580 N.Y.S.2d at 156.

The Court of Appeals correctly held that Chapter 947 unconstitutionally impaired the contract between PEF and the state and was neither reasonable nor necessary to further an important public purpose. There is no Contract Clause issue presented by this case which merits review by this Court.

POINT II

The repayment order does not violate the Eleventh Amendment.

Petitioners contend that the order to repay salary withheld pursuant to Chapter 947 is in conflict with this Court's decisions prohibiting a retroactive award of money damages against a state. (Petition, pp. 17-18) The repayment order, according to petitioners, is a "patent error," plainly in violation of the constraints of the Eleventh Amendment and therefore warrants review by this Court.

Petitioners' Eleventh Amendment claim raises two questions to be considered by this Court: whether, in light of the state court judgment on independent grounds ordering repayment of lagged salary, this Court should review any Eleventh Amendment claim petitioners might otherwise have; and whether the order that petitioners return salary withheld pursuant to Chapter 947 is "ancillary" to the declaratory and injunctive relief also awarded.

Petitioners' Eleventh Amendment claim, even if it otherwise had merit, does not merit review by this Court due to the existence of a state court judgment which, on independent state law grounds, orders the repayment of salary withheld pursuant to Chapter 947. As noted at Point I, *infra*, an arbitrator ruled that the collective bargaining agreement between PEF and the State had been breached by the introduction, adoption, signing and implementation of Chapter 947. (R.App.A1, A8) The arbitrator ordered the repayment of all lagged salary, plus interest. (R.App.A8)

The Union, pursuant to New York *Civ. Prac. Law and Rules* Article 75, petitioned for judicial confirmation of the arbitration award, and the state cross-petitioned to vacate the award. (R.App.A11) The petition was granted and the award was confirmed by decision of the New York Supreme Court, Albany County, dated July 30, 1992. (R.App.A11) Judgment was entered on August 12, 1992. (R.App.A13) The court based its decision on the failure of the State to establish any of the statutory criteria for vacatur: that the arbitrator exceeded his authority, acted irrationally, or that the award violated public policy.[8] (R.App.A11)

Respondents do not suggest that this case has been mooted by the arbitration award. Neither the arbitration award nor the judgment confirming the award resolve the dispute concerning the constitutionality of the lag payroll legislation. The arbitrator found that the actions of the Governor and the Legislature in promulgating Chapter 947 constituted a violation of the collective bargaining agreement and awarded repayment of salary withheld as a remedy.

Moreover, the arbitrator did not rule, nor did he have jurisdiction to rule on the constitutionality of Chapter 947 or on prospective violations of the collective bargaining agreement. The arbitrator certainly had jurisdiction to remedy a breach of the collective bargaining agreement. He did not have jurisdiction to enjoin the continuing application of the statute. Therefore, whether Chapter 947 violates the Con-

[8]The State has appealed this judgment, and oral argument before the New York Supreme Court, Appellate Division, Third Department, is set for April 30, 1993. Of course, despite the appeal, the state court judgment is entitled to full *res judicata* effect. *Petrella v. Siegel*, 843 F.2d 87 (2nd Cir. 1988), *citing*, *Huron Holding Co. v. Lincoln Mine Operating Co.*, 312 U.S. 183 (1941).

tract Clause was properly considered by the Court of Appeals.

Therefore, even if this Court were to grant this petition and even if the judgment were to be vacated based on Eleventh Amendment grounds, the state court judgment would still require repayment of all salary withheld from PS&T unit members pursuant to Chapter 947. Only the prospective application of Chapter 947 is untouched by the state court judgment, and petitioners have already admitted that the Eleventh Amendment does not bar this relief. (Petition, p. 17, n.6) There is, therefore, no need for this Court to exercise its discretion to review any Eleventh Amendment claims petitioners might have in this case because its review would not be dispositive of the obligation of the State of New York to repay the lagged wages.[9]

As to the merits of petitioners' claim that the repayment order violates the Eleventh Amendment, respondent submits that repayment is the kind of ancillary relief permissible under this Court's Eleventh Amendment decisions. The Eleventh Amendment does not bar an action in the federal courts to require state officials to conform their conduct to the mandates of the Constitution. *Ex parte Young*, 209 U.S. 123 (1908). The power of the federal courts to force state officials to follow the Constitution, even when they are acting under state law or policy, is based on the fiction that a state official carrying out an unconstitutional state law or policy is stripped of his or her official authority and may be

[9]The State of New York has agreed with at least two of the unions representing executive branch employees to repay the withheld salary prior to April 1, 1995. This is yet another reason why this Court should not review petitioners' claims that the repayment order violates the Eleventh Amendment.

personally enjoined to follow the mandates of the Constitution. *Ex parte Young, supra,* 209 U.S. at 123; *Papasan v. Allain,* 478 U.S. 265, 276-77 (1986).

Generally, suits for retrospective relief for money damages against the state are barred, but prospective injunctive relief, even though it might have an ancillary effect on the state treasury, is not. *Dwyer v. Regan,* 777 F.2d 825, 835-36 (2d Cir. 1985), *modified,* 793 F.2d 457 (2d Cir. 1986). Applying this standard to the respondent's claims, it is respectfully submitted that the relief ordered is not barred by the Eleventh Amendment.

Petitioners argue that Chapter 947 is a "salary deferral" plan or a "lump sum separation payment" and not a lag. The significance of the different terminology is, according to the petitioners, that the lag invalidated in *Surrogates I* was a new impairment every two weeks because the payroll pay dates were two weeks late each time. Again according to the petitioners, if Chapter 947 impaired the PEF/State contract, it did so only prior to March 31, 1991 because actual pay dates for executive branch employees were not changed. As a result, by the time the district court rendered its decision and order, there was no part of Chapter 947 (aside from those provisions concerning new employees) left to enjoin.

This argument fails on several grounds. First, and most significantly, Chapter 947 requires that employees hired after January 1991, and therefore not subject to the initial lag, be lagged one day in each of their first five payroll periods of employment. (J.App.57) As the 1988-91 PEF/State agreement is continued pursuant to New York law until a successor agreement is negotiated, and as no such

agreement has been reached, new employees in the PS&T unit have been and will continue to be subject to the lag provided by Chapter 947. *Surrogates II*, *supra*, 79 N.Y.2d at 45, 580 N.Y.S.2d at 155. (J.App.39) While petitioners characterize this as a "relatively minor" aspect of the case, they do admit that enjoining the implementation of the Chapter 947 lag for newly-hired employees is purely prospective relief. (Petition, p. 17, n. 6) For this reason alone, the declaratory and injunctive relief ordered by the courts below is not barred by the Eleventh Amendment.

Second, petitioners' argument completely ignores the fact that Chapter 947 not only authorized the initial withholding, it authorizes the continued withholding of earned compensation from PS&T unit members. (J.App.37-38) This statutory authorization to withhold salary continues until the employee leaves state service--something which will happen at an unspecified future date. Absent Chapter 947, the petitioners have no legal authority to continue to hold these salary payments until this future event occurs. Additionally, Chapter 947 specifies the terms upon which future payment to individual employees is to be made. (*Id.*) Therefore, as to each and every employee who has had salary withheld pursuant to Chapter 947 and who has not yet left state service, it is the continuing implementation of Chapter 947, and that only, which allows petitioners to withhold this compensation, in violation of the contract between PEF and the state and in violation of the Contract Clause.

The distinction petitioners attempt to draw between a "true lag" and Chapter 947 is a distinction without any real difference. As noted by the Court of Appeals in *Surrogates I*, the court employees were "lagged" when, in each of ten payroll periods, they were paid for nine days rather than the

ten days actually worked, and were paid for 50 rather than 52 weeks' work in the 1990-91 fiscal year. 940 F.2d at 769. This is exactly what happened to the executive branch employees, except that it involved five payroll periods and 51 rather than 50 weeks. (J.App.54-61) In both cases, the statutes at issue authorize the petitioners to keep the salary earned by these employees for an indefinite, future period. In both cases, the employee is paid less compensation than he or she is due for services performed during a given period of time. In both cases, the collective bargaining agreement is impaired not only by the initial withholding, but by the statutorily authorized retention of an employee's salary until the employee leaves state service.

The injunction against the application of the lag payroll law prevents state officials from continuing to withhold an employee's earned compensation until he or she leaves state service. That the release of this compensation is mandated upon entry of judgment, rather than at some indefinite date in the future, does not make the relief retrospective.

Moreover, the fact that an injunction against Chapter 947 requires payment to individual state employees from the state treasury does not mean that there is an Eleventh Amendment bar. This result is ancillary to the injunction, which merely requires the petitioners to "shape their official conduct to the mandate of the Court's decrees." *Edelman v. Jordan*, 415 U.S. 651, 668 (1974). Even if, therefore, salary withheld from individual state employees constitutes public funds, the restoration of salary withheld has merely an ancillary effect on the state treasury, a "permissible and often an inevitable consequence of the principle announced in *Ex parte Young*...." *Id.*

The Court of Appeals considered this same Eleventh Amendment defense in *Surrogates I*, in which the petitioners argued, in direct contradiction to their contentions in this case, that the May 1990 lag against the court employees was fully effectuated as of March 13, 1991 and that the claim for declaratory and injunctive relief was therefore moot. *Surrogates I*, *supra*, 940 F.2d at 774. The Court of Appeals rejected this argument and held that the 1990 lag payroll legislation was not barred, stating: "[s]ince the Eleventh Amendment does not bar suits against State officers to enjoin violations of federal law, and any monies that will be restored to the respondents from the State treasury are ancillary to the prospective relief which we order, petitioners' jurisdictional arguments are meritless." *Id.* at 774.

The Court of Appeals rejected petitioners' argument in this case as well, on the ground that there is no significant difference between the ten-day lag in *Surrogates I* and the lag in this case. (P.App.A12-13) The court was simply not convinced that "the release of the withheld money is barred by the Eleventh Amendment or that the action is moot because the withholding was complete as of March 31, 1991." *Id.*

Respondent respectfully submits that there is no legal distinction between the relief ordered by the Court of Appeals in *Surrogates I* and the relief ordered in this case. Therefore, this Court should also decline to exercise its discretion to review this judgment.

CONCLUSION

This court should deny the petition for a writ of certiorari.

Dated: March 24, 1993
Albany, New York

Respectfully submitted,

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NANCY L. BURRITT
Of Counsel

APPENDIX.

Opinion and Award of Herbert L. Haber, Arbitrator, Dated June 22, 1992.

In the Matter of the Arbitration between
PUBLIC EMPLOYEES FEDERATION

and

STATE OF NEW YORK

OER File No. 90-05-1272

PEF File No. 853-CA(a)

APPEARANCES:

For PEF:

Richard E. Casagrande, Attorney
By: Steven M. Klein, Esq.

For the State:

Walter J. Pellegrini, General Counsel OER
By: Richard W. McDowell, Esq.

BEFORE: Herbert L. Haber, Arbitrator

* * *

In accordance with their contract, the above named parties, hereinafter "PEF" and "State," have designated the

undersigned to hear and finally decide a dispute between them relating to the implementation of the "lag-payroll" legislation enacted by the Legislature and signed by the Governor.

Due notice having been given, hearings were held on January 28 and March 11, 1992, at which the parties appeared and were afforded ample opportunity to present evidence, examine witnesses, and make argument in support of their respective positions. Post-hearing briefs were submitted, which have been considered along with the material presented at the hearing in the preparation of the determination that follows.

The instant dispute has its genesis in a "deficit reduction" bill passed by the New York State Legislature on December 14, 1990, which contained a provision for a "separation lump sum payment plan," which is more commonly referred to as a "lag payroll." Simply put, the plan defers a total of five (5) days of pay earned during the last three (3) months of the 1990-91 fiscal year until separation from State service. The Governor signed the bill on December 26, 1990 and it was implemented shortly thereafter. It is undisputed that several of the prior Agreements collectively negotiated between the parties had included a provision containing a form of lag payroll, but that no discussions concerning the inclusion of a provision such as is in dispute here had occurred in the negotiations for the renewal of the then expiring Agreement. There had been some discussion regarding a State proposal for a mandatory five-day furlough, but none of the unions representing State employees had accepted it and legislation embodying such a proposal drafted by the Governor and submitted to the Legislature was never introduced in that body and did not become law.

The Union contends that the State's implementation of the lag payroll violated Articles 7, 41, and 47 of the Agreement between the parties. It points out that the deferment of

one week's pay under the plan results in an employee receiving a lesser annual salary than is stipulated in Article 7 which states in pertinent part:

> Effective April 1, 1990 a new salary schedule shall be established which shall consist of a hiring rate and a job rate for grades 1 through 37 and a hiring rate for grade 38. . . . The job rates shall be the job rates from the 1989-90 salary schedule increased by five and one-half (5.5) percent.

It further points out that the salary calculation under the lag payroll, which calls for employees to work ten (10) days and receive pay for only nine (9) days for five (5) consecutive payroll periods, does not conform to Article 41, which provides that "[e]mployees' salary payments will continue to be calculated on an appropriate 10 working day basis." Finally, the Union points out that Article 47 of the Agreement states:

> This agreement is the entire agreement between the State and PEF, terminates all prior agreements and understandings and concludes all collective negotiations during its term. *During the term of this Agreement, neither party will unilaterally seek to modify its terms through legislation or other means.* The parties agree to support jointly any legislation or administrative action necessary to implement the provisions of this Agreement. The parties acknowledge that, except as otherwise expressly provided herein, they have fully negotiated with respect to the terms and conditions of employment and have settled them for the term of this Agreement in accordance with the provisions thereof. (emphasis added)

It notes that, although there was no proof adduced that the Governor's office had drafted the lag-payroll legislation, it is undisputed that the Governor submitted the bill to the Legislature, provided a "Message of Necessity" enabling immediate consideration of the bill, and then signed the legislation after it was passed. The union acknowledges that only the Governor may submit a budget bill to the Legsialture, but it observes that the Legislature can modify the bill submitted and the Governor can sign the bill passed, decline to sign it, or veto it or any part of it. It argues that the Legislature's drafting of the bill ultimately signed by him, does not absolve the Governor of responsibility for it. Moreover, the Union points out that its contract is with the "State," that the Governor or his agent signs the Agreement as head of the executive branch and the contract is then approved, after such execution, by the Legislature pursuant to law. It avers that both branches of government are intimately involved in the contractual process and, therefore, actions by either constitute "State" action and can serve to breach the Agreement. Finally, it points out that virtually all of these arguments have been made and ruled on by Arbitrator George Nicolau in an arbitration involving the same lag-payroll issue between the State and Council 82, AFSCME, C82 No. C90-1883/OER No. 90-01-1217 (1991), in which the Arbitrator held that the State had violated the Agreement between the parties and directed the State to restore the withheld monies. It urges similar action here, with interest at the statutory legal rate from the date of the breach of the Agreement.

The State argues that the Union ignores the "dual aspect of the Governor's role in the legislative process" that, in addition to representing the State in its role as "employer," the Governor also represents the State in its "sovereign" capacity which in this instance encompasses his function as

an integral part of the budget process. After first noting that the lag legislation was not drafted or introduced by the Governor's Office or any other division of the Executive, it goes on to point out that only the Governor may submit a budget bill, and that a "Message of Necessity," which enables the Legislature to avoid the constitutional requirement that bills "age" for three (3) days before consideration, is issued by the Governor generally at the request of and as an accommodation to the Legislature. It further asserts that the governor's signing of the bill was also part of his "legislative function."

The State goes on to argue that, notwithstanding the possibility that the "lag legislation" does impair the Agreement between the parties, the Legislature is "constitutionally permitted to enact such legislation," and it offers a number of cases in support of this proposition (citations omitted). It contends, moreover, that such "constitutional" questions lie beyond my jurisdiction and that it is in the process of seeking vacature of the decision and award of arbitrator Nicolau in the Council 82 matter on the grounds, *inter alia*, that he exceeded the specific grant of arbitral authority provided in the parties' Agreement. The State also attacks, as a violation of Article 48 of the Agreement, the remedy (restoration of monies withheld under the lag-payroll legislation) Arbitrator Nicolau awarded. It points out that this article, entitled "SEVERABILITY," provides, in pertinent part, that "[i]n the event that the Legislature fails to implement Sections 7.1 through 7.7, any or all Articles may be reopened at the option of PEF or the State, and renegotiated." The State argues that this provision of "reopening and renegotiation" as a remedy governs any determination made in the instant matter.

DISCUSSION

The issue of whether the lag payroll violates the Agreement between the parties has largely been answered by the courts in a series of decisions addressing the constitutional questions relating to the lag payroll legislation, admittedly not before me, the most recent of which was issued on June 9, 1992 by the United States District Court for the Northern District of New York. In a case involving the parties to the instant matter, Judge Frederick J. Scullin, Jr., following the precedent he found to have been established in two prior cases, *Association of Surrogates and Supreme Court Reporters Within the City of New York*, 940 F.2d 766 (2d. Cir. 1991) *cert. denied* ____ U.S. ____, 112 S.Ct. 936, ____ L.Ed.2d ____ (1992); *Association of Surrogates and Supreme Court Reporters Within the City of New York*, 79 N.Y.2d 39, 588 N.E.2d 51, 580 N.Y.S.2d 143 (1992), found that the lag payroll "effects a substantial impairment of contract" and was not "reasonable and necessary," and held that it "violates the Contract Clause of the U.S. Constitution." My conclusions, on contractual grounds, are in accord with the substantive findings of the Court and with those of Arbitrator Nicolau, who also found the lag payroll legislation to have breached the Agreement between the State and Council 82.

I also find myself in agreement with Nicolau's response to the State's attempts to avoid responsibility for this violation. In rejecting the State's claim that the modification of the Agreement was solely the act of the Legislature, which it asserted was a non-party to the Agreement and therefore could not violate the Agreement, he stated:

> I cannot accept that reasoning. By statute and by Contract, specifically the 'legislative approval' pro-

> vision of Article 30, the Legislature is an integral element of the contract-making process. Without its approval, compensation clauses and like provisions are not effective. Once that approval is given, however, the Contract becomes a binding commitment of the State. If the Legislature could simply abrogate the commitment at its pleasure, the required approval becomes meaningless and the contractual commitment illusory.

In denying the State's assertion that the Governor did not violate the State's contractual commitment to not "unilaterally seek to modify its terms through legislation or any other means," he noted:

> It's true that the Governor's Office and GOER did not draft it. But it's obvious that the bill could not have moved forward to virtually immediate passage without the Governor's aid and cooperation and that it could not have become law at the time it did without his signature.
>
> These acts—the sending of the budget bill, the transmittal of the message of necessity and approval of the legislation—were not routine accommodations and minsterial acts. Nor were they required in the sense they were compelled by rule or statute. They were voluntarily performed. A choice was made.

The Executive and the Legislature are separate branches of government with distinct rights and duties. It is not necessary to examine closely into this area in the current instance since both are involved in the contractual process and the facts establish that each has acted to breach the Agreement.

The Arbitrator's determination of a remedy must conform to the law and the Agreement and a party may cite any provision of the Agreement in support of or in opposition to a particular remedy. The State is not denied the right to raise Article 48 as a shield against a monetary award because such defense has not previously been raised in the grievance or the issue of this matter. The State's reliance on that provision in the current instance, however, is misplaced. The Article contemplates a procedure for redress when the Legislature's failure to implement the salary provisions has legal basis. The State may not violate the Agreement and then seek the protection of the Agreement to, in effect, legitimize its improper act. I am satisfied that I have the authority to award a make-whole remedy and I consider the eight percent (8%) interest rate directed by Arbitrator Nicolau to be appropriate.

Accordingly, on the basis of the foregoing, I find and make the following

AWARD

The State of New York did violate the Agreement between the parties when the Governor submitted, the Legislature passed, and the Governor signed and implemented S.9195/A.12235.

The State is directed to pay to all members of the bargaining unit all salary withheld from them through the wrongful implementation of S.9515/A.12235 together with interest at the rate of eight percent (8%) interest per annum from the date such monies were withheld until such payment is made.

Dated: June 22, 1992

STATE OF NEW JERSEY)
) ss:
COUNTY OF BERGEN)

I, Herbert L. Haber, upon my oath as arbitrator, do hereby affirm that I have executed this instrument, which is my Award.

HERBERT L. HABER, Arbitrator

Decision of New York Supreme Court, Albany County, Dated July 30, 1992.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

IN THE MATTER OF THE APPLICATION

OF

HOWARD A. SHAFER, as President of the PUBLIC EMPLOYEES FEDERATION, AFL-CIO,

Petitioner,

against

JOSEPH M. BRESS, as Deputy of the New York State Governor's Office of Employee Relations; the NEW YORK STATE GOVERNOR'S OFFICE OF EMPLOYEE RELATIONS; and the STATE OF NEW YORK,

Respondents.

Index No. 4282-92

(Supreme Court, Albany County, Motion Term,
July 24, 1992)
(RJI No. 0192-30966)
(JUSTICE HAROLD J. HUGHES, Presiding)

APPEARANCES:

Richard B. Casagrande, Esq., Attorney for Petitioner, (Steven M. Klein, Esq., of Counsel), 1168-70 Troy-Schenectady Road, P.O. Box 12414, Albany, New York 12212-2414

Hon. Robert Abrams, Attorney General of New York State, Attorney for Respondents, (Ellen Lacy Messina, Esq., of Counsel), The Capitol, Albany, New York 12224

HUGHES, J.:

The application of the petitioner for a judgment confirming an arbitration award will be granted, and the cross petition of the respondents to vacate the arbitration award will be denied.

The State, through the Governor's Office of Employee Relations, entered into a collective bargaining agreement whereby the employees represented by the Public Employees Federation (PEF) were to be paid in a certain manner. As part of a plan to meet the State's current fiscal crisis, the Governor's office recommended that payment of a portion of wages earned by State employees be deferred. On December 14, 1990, the Legislature passed an amendment to section 200 to the State Finance Law, later signed by the Governor, which authorized a lag payroll. When the lag payroll was implemented against PEF's members, the union resorted to arbitration under the Collective Bargaining

Agreement to void it. While the arbitration was pending, Federal District Court Judge Scullin held in *McDermott and Condell v. Cuomo*, ____ Fed. Supp ____ (USDC, NDNY, June 9, 1992) that the legislation authorizing the lag payroll was unconstitutional as a violation of the Contract Clause of the United States Constitution. That determination has not been stayed, or overturned on appeal. Consequently, the arbitrator here had before him the relatively simple issue of whether an unconstitutional law could be the basis to abrogate the collective bargaining agreement. The arbitrator determined that the State violated the agreement, and directed the State to pay to all affected employees the salary wrongfully withheld, together with interest. The petitioner seeks to confirm that award, and the respondents argue that it should be overturned upon the grounds that it is irrational, that the arbitrator exceeded his authority, and that the award violates public policy.

Every court or other tribunal that has passed upon the lag payroll has rejected it. Here, respondents have failed to establish that the arbitrator exceeded his authority, acted irrationally, or that the award violates public policy.

Submit judgment.

Dated: July 30, 1992

Judgment of New York State Supreme Court, County of Albany, Entered August 12, 1992.

STATE OF NEW YORK SUPREME COURT

COUNTY OF ALBANY

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Albany, at the Albany County Courthouse, Albany, New York, on the 24th day of July, 1992.

Present:

Hon. Harold J. Hughes
Justice Presiding

IN THE MATTER OF THE APPLICATION

OF

HOWARD A. SHAFER, as President of the PUBLIC EMPLOYEES FEDERATION, AFL-CIO,

Petitioner,

For an Order Pursuant to CPLR §7510 to Confirm an Arbitration Award

and

JOSEPH M. BRESS, as Director of the New York State Governor's Office of Employee Relations; the NEW YORK STATE GOVERNOR'S OFFICE OF EMPLOYEE RELATIONS; and the STATE OF NEW YORK,

Respondents.

Index No. 4282-92
RJI No. 0192-30866

The petitioner, Howard A. Shafer, having applied pursuant to CPLR §7510 for confirmation of an award in arbitration, signed and acknowledged on the 22nd day of June, 1992, a copy of which is annexed to and made a part of this judgment, whereby petitioner was awarded payment to all affected members of the Professional, Scientific and Technical Services bargaining unit of State employees all salary wrongfully withheld from them, together with interest.

NOW, this proceeding having duly come on to be heard before the undersigned Justice of this Court at a Special Term held at the Albany County Courthouse on the 24th day of July, 1992, and upon reading and filing the notice of petition dated June 30, 1992, with proof of service thereof, the petition dated and verified June 30, 1992, together with annexed exhibits, the award signed and acknowledged on June 22, 1992, all in support of the application; and the respondents' answer and cross-petition with annexed exhibits dated and verified July 10, 1992, in opposition thereto; and petitioner's reply to respondent's answer and cross-petition dated and verified July 24, 1992; and the petitioner having appeared by Richard E. Casagrande, Esq. (Steven M. Klein, Esq., of counsel), in support of said application, and the respondents having appeared by the Honorable Robert Abrams, Attorney General of New York (Ellen L. Messina, Esq., of counsel), in opposition thereto, and after due deliberation, the Court having rendered a written decision dated July 30, 1992 directing the entry of judgment as hereinafter set forth, a copy of which is annexed hereto.

NOW, on motion of Richard E. Casagrande, Esq., (Steven M. Klein, Esq., of counsel), attorney for the petitioner, it is hereby

ORDERED, ADJUDGED AND DECREED that the application to confirm the arbitration award is in all respects granted; and that the cross-application to vacate said arbitration award is in all respects denied; and it is further

ORDERED, ADJUDGED AND DECREED that the petitioner recover from the respondents all costs and disbursements of this proceeding, to be taxed by the Clerk.

DATED: August 12, 1992

s/ HAROLD J. HUGHES
HONORABLE HAROLD J. HUGHES
Justice of the Supreme Court

ENTER: